

CONGRESSIONAL RESPONSE TO ADMINISTRATIVE
REGULATION: THE 1951 AND 1952
PRICE CONTROL AMENDMENTS

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WHILE rearmament and cold war persist, inflation, whether present or potential, will remain a national hazard. Its universal impact makes inflation a problem which no Administration can neglect; recent efforts to repress it will almost surely continue after the inauguration of President Eisenhower next month. The new President is firmly committed to an anti-inflation program, for the drop in dollar buying power led housewives and industrial workers to support him at the polls. Moreover, the country cannot easily afford the tax increases or larger armament and foreign aid appropriations that price inflation would require. The new Administration's approach and emphasis, of course, may vary from past efforts, and its program may totally exclude direct price controls. But the Administration may well discover that in aligning governmental forces affecting the status of the dollar, direct controls are a necessary adjunct to credit restrictions, taxes, and wage controls. And in any attempt to structure direct price controls, the Administration—and the Congress as well—will have to look to the past two years of price stabilization experience. An important part of that experience has been the history of interaction between Congress and the Office of Price Stabilization and the results of this interaction on the campaign against inflation. It is in this setting that the following pages bear on the national interest.

PRELUDE TO REGULATION

In September, 1950, a few months after the communist aggression in Korea, Congress enacted the Defense Production Act providing broad powers for the imposition of production, allocation, credit, price, and wage controls.¹ It was the first time in the nation's history that such economic controls were

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1. 64 STAT. 798 (1950), 50 U.S.C. APP. § 2061 (Supp. 1952).

authorized in a period short of all-out war. This phenomenon resulted from a complex of circumstances, of which at least two were directly responsible for price controls. Most important was congressional recognition of the inflation, largely attributable to a wave of scare buying that had already caused the nation to feel the impact of rapidly pyramiding living costs. "Politics" was also a factor. With a national election but two months away, a vote for Administration emergency powers served to demonstrate to the electorate that Congress had done its job. And there may have been some Congressmen who felt, somewhat hopefully, that the task of administering controls might react against the Administration as it unquestionably had in the 1946 mid-term election.²

The relative effectiveness of World War II price controls in holding the line³ created an expectation that similar results would follow almost immediately upon enactment of the Defense Production Act. But this was not the case. Although the President promptly established an organizational framework for imposition of direct controls,⁴ both the staffing of the new organization and creation of a program progressed slowly. In the context of the Administration's position during the debates on the legislation, this should not have been surprising. The President had vigorously opposed the so-called "Baruch Plan" for an immediate freeze of prices and wages.⁵ And initially, he did not seek legislative authority for direct controls. Moreover,

2. In June, 1946, Congress passed price control legislation which President Truman promptly vetoed. After a hiatus in legislative authority and controls, Congress passed, and the President signed, the Price Control Extension Act of 1946, providing for the continued decontrol of significant commodities and their recontrol based upon findings of a new statutory body, the Price Decontrol Board. 60 STAT. 664 (1946). During this period prices moved up swiftly; and, in spite of the Board's order permitting the recontrol of certain of these commodities, the President ordered the termination of all controls in October 1946. See 19 and 20 QUARTERLY REPORTS OF THE OFFICE OF PRICE ADMINISTRATION (1947). For the first time since the 1928 elections, the Republicans won control of both houses of Congress.

3. See MANSFIELD, A SHORT HISTORY OF OPA (HISTORICAL REPORTS ON WAR ADMINISTRATION: OPA) (Gen. Pub. No. 15, 1947); and HARRIS & RITZ, PROBLEMS IN PRICE CONTROL: STABILIZATION SUBSIDIES (HISTORICAL REPORTS ON WAR ADMINISTRATION: OPA) (Gen. Pub. No. 10, 1947).

4. By executive order the President delegated the stabilization authority in the Act to the Administrator of the Economic Stabilization Agency. Exec. Order No. 10161, 15 FED. REG. 6105 (1950).

5. The Senate Banking and Currency Committee's reaction to the Baruch position was reflected in the report recommending the Defense Production Act, SEN. REP. NO. 2250, 81st Cong., 2d Sess. 4 (1950); see also 96 CONG. REC. 11609 (1950). Mr. Baruch had argued a similar proposal prior to the enactment of the Emergency Price Control Act of 1942. See *Hearings before House Committee on Banking and Currency on H.R. 5479*, 77th Cong., 1st Sess. 989-1045 (1941). This issue is discussed in Field, *Economic Stabilization under the Defense Production Act*, 64 HARV. L. REV. 1, 4-7 (1950). See also Ginsburg, *Price Stabilization, 1950-1952: Retrospect and Prospect*, 100 U. OF PA. L. REV. 514 (1952).

immediate use of direct controls was precluded by a provision of the Act requiring that a test of "voluntary methods" should precede resort to mandatory controls,⁶ although the statute did not specify how long the test should run.

Although the Administration's failure to impose mandatory direct price controls at an early date courted disaster,⁷ the reasons for the hesitation were understandable. Basic to the Administration's cautious attitude was the difficulty of giving affirmative answers to two important questions. Were stabilization controls really necessary? Scare buying had produced the early price advances, and prices had now leveled off. If controls were to be imposed shortly after enactment of the Defense Production Act, opponents of the Administration were certain to complain of "controls for control's sake." Secondly, were the people ready for direct controls? The great majority of the population would not be disturbed by regulations involving allocation, production, and credit (at least in 1950 when savings were substantial); but price and wage controls were different. True, the country had promptly accepted price control when the Emergency Price Control Act was passed in January, 1942. In September and October of 1950, on the other hand, it was difficult to convince many people that the Korean attack of June, 1950, was another Pearl Harbor. If the great mass of the population rebelled against controls, this might preclude their effective use at a later and more crucial date.

By December, 1950, after the significance of Chinese intervention in the Korean struggle had become clear, these questions became easier to answer. The United Nations had suffered a serious reverse from which it might take many months to rebound. A vast mobilization effort appeared necessary, not only to assure victory in Korea but to deter Communist aggression elsewhere. It was recognized that broad economic measures were necessary to withstand inflationary pressures resulting from mobilization, and that these measures would be supported by the American people.

THE BEGINNINGS OF REGULATION

The first stop-gap measure was a set of voluntary pricing standards, issued December 19, 1950, under which manufacturers and distributors were asked generally to refrain from price advances, to limit price increases to those compensating for higher costs, and to give the government seven days' notice

6. Sections 402(a), (b), 64 STAT. 803 (1950), 50 U.S.C. APP. § 2102(a), (b) (Supp. 1952). At the request of Senator Capehart, Price Director Arnall made available to Congress the Administration's legal analysis of this provision (as prepared in 1950), together with a summary of its legislative history. See *Hearings before Senate Committee on Banking and Currency on S. 2594 and S. 2645*, 82d Cong., 2d Sess. 1274-81 (1952).

7. Senators Maybank and Capehart have vigorously criticized the Administration for the failure to impose mandatory controls at an early date. See, e.g., 97 CONG. REC. 7033-4 (1951), 98 CONG. REC. 6307, 6334-6 (May 29, 1952). See also *Hearings, supra* note 6, at 1260-8.

of any price increases.⁸ Accompanying the announcement of the voluntary program came the threat of mandatory controls if the voluntary standards for combatting price rises were not followed. With the Administration's assurance that no one who followed these standards would be prejudiced in subsequent price action, the program unquestionably softened rises in some segments of the economy.

But a great many sellers did not believe the Government would or could make good on its assurance, and others were simply disinclined to hold the line. Thus numerous price rises were taken, usually without informing the government. In one case the automobile manufacturers gave notice that wage increases compelled an advance in their prices. Failing to prevent by persuasion what it regarded as an unjustified increase, the Economic Stabilization Agency (ESA) issued the first mandatory price and wage regulations—Ceiling Price Regulation 1 and Wage Stabilization Regulation 1—which were applicable to manufacturers' sales of new automobiles and wages paid in their factories.⁹ Moreover, the auto producers' attitude and related experiences strengthened the hand of Administration members who desired a program of general mandatory controls. Alan Valentine, the Economic Stabilization Administrator, who had been reluctant to impose general controls, was replaced by Eric Johnston, who was convinced that half measures were ineffectual and overall controls essential. Michael V. DiSalle, Director of Price Stabilization, who had argued strenuously for general controls, was instructed to staff the Office of Price Stabilization as quickly as possible and to issue regulations necessary to halt rising prices.¹⁰

The general freeze. The drafting of regulations began in earnest. Specific regulations were framed for certain crucial items, including hides, fats and oils, wholesale and retail food, scrap metals, and tallow and soap. But OPS attention centered on the General Ceiling Price Regulation (the GCPR or "general freeze"), issued January 26, 1951.¹¹ This regulation "froze" prices at the highest prices charged by individual sellers during the period between December 19, 1950, and January 25, 1951. As the administration of GCPR was soon to demonstrate, selection of the then current base period was most unfortunate, if not one of the most serious mistakes in the entire price-control program. In that base period, not only were prices at the highest level in national history but price relationships were badly out of balance; numerous sellers had increased their prices far out of proportion to cost increases, whereas other sellers had held the line even though their costs had soared. Thus the GCPR resulted in undermining the earlier assurance that

8. 15 FED. REG. 9255 (1950).

9. 15 FED. REG. 9061 (1950).

10. The authority to issue ceiling price regulations was at this time re-delegated to the Director of the Office of Price Stabilization. ESA General Order No. 2, 16 FED. REG. 738 (1951).

11. 16 FED. REG. 808 (1951).

those who had cooperated in the voluntary program would not suffer for it. It is safe to conclude that had the freeze rolled back prices to a representative pre-Korea period, many difficulties that later arose to plague OPS would never have come to pass.

To remedy the disturbed price relationships resulting from the general freeze and to make progress in the reduction of prices for meat and industrial materials, OPS began the formulation of specific regulations for manufacturers, distributors, and the meat industry. These will be referred to subsequently. But before these regulations were to become fully effective, Congress was to take a hand in constructing the regulatory program. At this point it is appropriate to refer, in general terms, to the process of price control legislation.

THE LEGISLATIVE PROCESS

Factors Responsible for Amendments

Between December, 1950, and June 30, 1951, OPS issued a total of 889 different regulations.¹² These were supplemented by numerous official interpretations, mostly in connection with the general freeze, and by a huge number of responses to inquiries about regulations.¹³ It was something of a phenomenon that this much could be accomplished in so short a time by such a limited staff. But volume production has always characterized price control experience.¹⁴

This volume alone is certain to evoke some kind of response from the Congress. Reasonable men in Congress often assume that private industry's objections to particular regulations must have some merit: how could ordinary human beings fail to make mistakes when regulations are formulated and issued so rapidly? Thus whenever industry objections lead Congress to make detailed amendments, the general assumption is that the product of the thinking and compromising of 531 men elected by the people must necessarily

12. REP. OF THE RECORDING SEC'Y, OPS (Aug. 1951 and Aug. 1952); REPORT OF FIELD OPERATIONS DIVISION, OFFICE OF CHIEF COUNSEL, OPS (Oct. 1952).

13. Including the regulations issued prior to June, 1951, the National Office of OPS had issued, up to June 30, 1952, a total of 11,391 regulations of various kinds; by August 31, 1952, the National Office had completed action on 180,009 price actions, including approval of adjusted ceilings self-determined under Capehart Amendment regulations; up to September 30, 1952, OPS field offices had completed work on 44,563 additional price actions; between January, 1951, and September 30, 1952, national and field offices had issued a total of 52,423 written interpretations; and it was estimated that OPS offices had given 247,859 "oral explanations" of regulations in the fiscal year July 1, 1951, to June 30, 1952.

14. In 1941-2, even prior to the enactment of the Emergency Price Control Act of 1942, some 105 non-mandatory price regulations had been issued. 1 QUARTERLY REPORT OF THE OPA 23 (1942). According to an unofficial estimate of the National Archives, OPA issued 93,500 regulations of various kinds.

be better for both the industry affected and the national economy than the regulation which it has modified.

Yet it would be impossible for all 531 members to share fully in the legislative decision. The volume of regulations, combined with the broad area of their coverage, means that Congressmen will often be unable to base their own judgments upon all the facts; they will be required to choose between the agency judgment with respect to the purposes and techniques of a regulation and a congressional committee's judgment based upon the objections of the affected industry. Congress can seldom postpone and ponder this decision, which must be made in connection with the yearly extension of price control authority.

Even if price control were to be administered through a very few regulations, it is doubtful that the legislative process would be much different. Whether numerous or not, any regulations affecting small as well as large sellers and governing sales at every stage of production and distribution will attract at least as much fire as the federal income tax laws. Moreover, the administration of price control contains legislative risks not to be found in the administration of the revenue acts. The concept of net income and the itemization of deductions can be standardized for tax purposes, but in price control every industry, sometimes every geographical area, and occasionally each manufacturer and distributor, must be considered and provided for independently. Under these circumstances objections to the regulatory program are a certainty, no matter how expert the staff and how thorough the formulation. But when the agency is both undermanned and rushed, complaints multiply, for mistakes and imagined mistakes will be commonplace. The really surprising thing is that error is far from the rule.

Effective executive activity in the legislative process can come only while Congress deliberates, not later. Citizens usually bring their grievances about the price control program to Congress at the most propitious time: when the committees of the Congress are considering the annual extension of price control legislation. If an objection to the program is sufficiently persuasive, either on its merits or perhaps because of its political appeal, it will result in a rider-amendment to the new legislation. And, as with appropriation acts, the threat of veto is of little significance. Congress is aware that the President, mindful of the 1946 hiatus in controls and the resulting price inflation, will not veto price control legislation and thus interrupt controls in order to nullify an objectionable rider. Hence, the veto power plays but a small part in the legislative process.

Volume of Amendments

Considering these factors, the number of important statutory amendments adopted in 1951 and 1952¹⁵ is not astonishing. In 1951 some 39 amend-

15. 1951 amendments: 65 STAT. 131 (1951), 50 U.S.C. APP. § 2061 (Supp. 1952); 1952 amendments: Pub. L. No. 429, 82d Cong., 2d Sess. (June 30, 1952).

ments were added to the Defense Production Act, of which 19 were directed at the OPS price and meat allocation programs. In 1952 some 33 additional amendments finally became part of the Act, 20 of which related to OPS administration.

The number of amendments actually adopted, however, represents only a small fraction of the total number of amendments actually introduced in 1951 and 1952 during various stages of the legislative program. In 1951 a total of 217 amendments were offered, of which some 104 dealt with the price control and meat allocation programs. In the 1952 session a total of 167 bills and amendments were offered, of which some 57 related to OPS-administered programs.

A breakdown of these data shows that legislative pressure to alter the administrative process is largely of a "bipartisan" nature. Ninety-six of the 1951 amendments were offered by Republicans and 121 by Democrats, while in 1952 the principal sponsors of 84 amendments were Republicans, with 83 coming from the Democratic side. The total for both years combined, covering both houses: 180 amendments sponsored principally by Republicans, and 204 by Democrats.

THE MANUFACTURERS' REGULATIONS AND THE CAPEHART AMENDMENT

The Basic Pricing Standards

In framing regulations, OPS was required to measure its ceilings against the basic pricing standards set forth in Title IV of the Defense Production Act.¹⁶ The Act directs that ceilings shall be "generally fair and equitable." This same legislative pricing standard appeared in the Emergency Price Control Act of 1942. Since both OPA and OPS issued general freeze regulations containing later base periods than those set forth in the 1942 and 1950 Acts, thus setting prices at more generous levels than the statutes required, there was little question that freeze regulations and the tailored regulations based on them would be "generally fair and equitable" for some time to come. In the case of OPS, this conclusion would be particularly compelling because only two tailored regulations preceded the freeze, compared to some 105 issued prior to OPA's general freeze.

The 1950 Act (like the 1942 Act) did not permit the Agency to rest on ceilings originally established, but required that regulations continue to meet the "generally fair and equitable" standard as the cost of labor, materials, and doing business increased. This was reenforced by the requirement of Section 402(c) that in determining and adjusting ceilings, OPS must consider "[s]peculative fluctuations, general increases or decreases in cost of production, distribution, and transportation, and general increases or decreases

16. For discussions of these legislative standards, see Field, *Economic Stabilization under the Defense Production Act*, 64 HARV. L. REV. 1 (1950); and Durham, *The Present Status of Price Control Authority*, 52 COL. L. REV. 868 (1952).

in profits earned . . . subsequent to June 24, 1950." These very general words required detailed elaboration, both to provide fair and rational administration of the Act and to further the Act's anti-inflationary objective by providing a test under which some cost increases would be absorbed by the seller.

In formulating its standards, OPS looked for guidance to the policies of OPA, which had operated under identical legislative standards and had faced the same problem of cost absorption. In brief, the meaning given "generally fair and equitable" by OPA was that a manufacturer's ceiling price *remained* valid, in spite of increased costs of production, so long as (1) his industry's earnings equalled those experienced in 1936-39, and (2) his industry was not producing an individual product at an "out-of-pocket" loss. These came to be known as the "Industry Earnings" and "Product" standards. These standards had been thoroughly scrutinized by Congress and the courts, and had survived.¹⁷

In early 1951 a task force within OPS began the formulation of equivalent "Industry Earnings" and "Product" standards. The initial statement of the "Industry Earnings" standard appeared in a directive from Economic Stabilizer Eric Johnston to Price Director DiSalle:

"The level of price ceilings for an industry shall normally be considered 'generally fair and equitable' under the Defense Production Act if the dollar profits of the industry amount to 85 per cent of the average for the industry's best three years during the period 1946 to 1949, inclusive. The profits should be figured before Federal income and excess profits taxes and after normal depreciation only, with adjustments made for any changes in net worth."^{17a}

This administrative construction of the Act was repeatedly stated by Charles E. Wilson, Eric Johnston, and Michael V. DiSalle in the hearings on the 1951 amendments.¹⁸ Price Director Ellis Arnall later announced more detailed statements of these standards,¹⁹ which applied to all areas of price control but were particularly important in framing regulations setting manufacturers' ceilings.

17. The most exhaustive descriptions of these administrative standards appear in a pamphlet, OPA, GENERAL STANDARDS FOR SETTING MAXIMUM PRICES (1946), and in CAVERS & ASSOCIATES, PROBLEMS IN PRICE CONTROL: PRICING STANDARDS (HISTORICAL REPORTS ON WAR ADMINISTRATION: OPA) (Gen. Pub. No. 7, 1947). See also *Armour & Co. v. Bowles*, 148 F.2d 529 (Em. Ct. App. 1945), *cert. denied*, 325 U.S. 871 (1945); *Gillespie-Rogers-Pyatt Co. v. Bowles*, 144 F.2d 361 (Em. Ct. App. 1944).

17a. 1 BUREAU OF NATIONAL AFFAIRS, FEDERAL CONTROLS, 305 Price, 91:1 (April 21, 1951).

18. *Hearings before Senate Committee on Banking and Currency on S. 1397*, 82d Cong., 1st Sess. 21-2, 521, 561, 564, 594-7, 632, 1555, 1802, 2211, 2778 (1951). See also *Hearings before House Committee on Banking and Currency on H.R. 3871*, 82d Cong., 1st Sess. 1116-7, 1256-7, 1466, 1748, 1981 (1951); 97 Cong. Rec. 7223 (June 25, 1952); *id.* at 7683 (June 29, 1952).

19. OPS Press Releases, GPR Nos. 1234, 1390, Feb. 19, Apr. 22, 1952.

Early Manufacturers' Regulations

Immediately after the imposition of the general freeze, OPS began issuing special regulations for manufacturers. These regulations, starting with the General Manufacturers' Regulation (CPR 22),²⁰ were extended to include machinery, machine tools, farm machinery and other related industries (CPR 30),²¹ woolen yarns and fabrics (CPR 18),²² cotton textiles (CPR 37),²³ men's and women's apparel (CPR 45),²⁴ and shoes (CPR 41).²⁵ Under these regulations individual manufacturers would calculate their own ceiling prices by adding to their pre-Korea prices the increased direct labor and material costs since Korea and up to prescribed cut-off dates. These regulations would allow advances over the "general freeze" ceiling where prices had not kept pace with cost increases, while rolling back those prices which were raised beyond cost increases. The Agency estimated that five billion dollars a year would be saved for consumers and military services by virtue of these industrial rollbacks.²⁶ The pricing method also had the advantage of not penalizing those who cooperated in the Government's voluntary program, and of not favoring those who had ignored the program. At the time of congressional consideration of the 1951 amendments, the manufacturers regulation had been issued but had not become effective on a compulsory basis. However, manufacturers were permitted an option of pricing under these regulations prior to the compulsory effective date. In addition, beef rollbacks approximating \$700,000,000 were scheduled for August 1 and October 1;²⁷ although better publicized, these were not nearly so important as the manufacturers' rollbacks.

The Anti-Rollback Provisions

Their genesis. For opponents of price control, the most effective strategy was to persuade Congress to prohibit any rollbacks. Such a prohibition would necessitate substantial additional price increases for those commodities which had not kept pace with the general increase; a balanced price structure could be achieved only at the level of prices which had risen the most.

Opponents of the program used an argument always effective with Congress and with the public, that rollbacks coming so late after the imposition

20. 16 FED. REG. 10535, 11809 (1951).

21. 16 FED. REG. 12050 (1951).

22. 16 FED. REG. 3039 (1951).

23. 16 FED. REG. 4644 (1951).

24. 16 FED. REG. 9230 (1951).

25. 16 FED. REG. 5044 (1951).

26. 97 Cong. Rec. 7213-5 (June 25, 1951).

27. See statement of Congressman Cooley, Chairman, House Committee on Agriculture, in *Hearings before House Committee on Banking and Currency on H.R. 3871*, §2d Cong., 1st Sess. 2144, 2148 (1951), criticizing these rollbacks; see also OPS Memorandum on Beef Price Control Program, *id.* at 1280-92, defending the announced beef rollbacks.

of the general freeze would hamper production and thus increase inflationary pressures. Another assertion was that rollbacks, by reducing excess profits, would reduce tax collections. When passions ran high, this assertion shifted into the claim that rollbacks embodied "profit control." Some industry witnesses before the Senate Banking and Currency Committee advocated not only a ban on rollbacks, but also a mandatory requirement that ceilings must be increased to reflect increases in wages and raw materials. The principal proponent, George Terborgh of the Machinery and Allied Products Institute, summarized this proposal in these words:

"(1) Require OPS in establishing ceiling prices on capital goods (and on accessories, attachments, and specialized components thereof) to relate the ceilings to prices in effect during the base period of the general ceiling price regulation.

"(2) Provide that approved increases in wage rates and salaries and increases in the ceiling prices of suppliers occurring after the close of the base period can be automatically 'passed through' as adjustments of the initial ceiling prices."²⁸

Disagreement among Senate Committee members. The Senate Committee did not embrace this double-barreled relief proposal.²⁹ However, the Committee, voting 7-6, recommended a new subsection to Section 402(d) of the Act, which would prohibit ceilings below the lower of

"(A) the price prevailing just before the date of the issuance of the regulation . . . or

"(B) 90% of the price prevailing during the period January 20, 1951, to February 24, 1951, inclusive."

The effect of paragraph (A) was to prevent the rollbacks in the manufacturers regulation from becoming effective and of paragraph (B), to prevent any additional rollbacks on livestock and beef. The Committee argued for this proposal in these terms:

"The Government has had, since the general price freeze in January 1951, 5 months to roll back any prices which were seriously out of line. Producers should not be required or expected to go on indefinitely not knowing whether their prices will be rolled back to a pre-Korea level.

"Since anything which hampers production has an inflationary tendency, your committee came to the conclusion that it would contribute to the stabilization program to impose limitations on the authority to roll prices back.

"At the same time, your committee was of the opinion that the roll-backs which had already taken effect could not reasonably be

28. *Hearings before Senate Committee on Banking and Currency on S. 1397*, 82d Cong., 1st Sess. 2309 (1951).

29. SEN. REP. No. 470, 82d Cong., 1st Sess. (1951).

considered a hardship on producers, or a threat to production. Consequently, the decision was made not to recommend cancellation of roll-backs taking effect before the enactment of the amendment."³⁰

The base periods contained in this proposal did not *expressly* supersede the May 24-June 24, 1950, pre-Korean base period contained in Sections 402(b) and 402(c) of the 1950 Act. Yet it was not possible to deny that the Act set up a new standard for the manufacturers regulations and for beef. Moreover, it was quite clear that it would be administratively impossible to use different base periods for other areas of the economy; ceilings for many commodities necessarily must be set with reference to ceilings in other areas, lest the productive balance be impaired. The Committee apparently was aware that its proposal would demand a single base period, and it admonished the Agency to "hold the line" at the new base period. The report read:

"... While your committee realizes that to fix in the law a price freeze on the date of January 24 would be impractical, and in very rare instances perhaps unworkable, it urges that the Price Administrator hereafter in fixing any maximum ceiling not fix a maximum ceiling at a higher price than the minimum price existing for the commodity in the period January 24-February 24. This will once and for all stop any further price increase based on other price increases that were in turn based on other price increases."³¹

At this stage of legislative consideration many committee members believed that prices could be stabilized at the level prevailing in January and February, 1951. This conclusion, however, was possible only in theory: some producers' prices exceeded this general level, and since rollbacks were to be forbidden, equality of ceilings could come only through raising all ceilings to the highest prices.

Six of the thirteen Committee members, including Senator Ives, took issue with the majority.³² The five Democratic dissenters adopted most of the arguments which had been made by Economic Stabilizer Johnston and Price Director DiSalle—and added some others. They asserted that proper ceiling price relationships could not be based upon the new base period of January-February, 1951, because of distorted price relationships and abnormally high price levels then prevailing. They raised serious interpretive questions about the anti-rollback amendment and argued that farmers and industrialists need not anticipate a rollback to May-June, 1950:

30. *Id.* at 16-17.

31. *Id.* at 18.

32. These dissents took the form of "Additional Views of Senators Fulbright, Sparkman, Douglas, Benton, and Moody on the Anti-Rollback Amendment," and the substantially similar "Individual Views of U. S. Senator Irving M. Ives." SEN. REP. NO. 470, 82d Cong., 1st Sess. 27-34, 38-40 (1951). In addition, Senators Douglas, Benton, and Moody filed a "Supplementary Statement" urging that the Act be strengthened in particular respects. *Id.* at 35-7.

"It must be admitted that to say that the Price Administrator has the authority to roll prices back to June 1950 gives the appearance of a drastic power in the hands of Mr. DiSalle. We believe that this is not a fair phrasing of the present provisions of the law, which require that he 'give due consideration to' the prices prevailing in the pre-Korea period. To roll prices back completely, without giving any consideration to cost increase since that date would, we believe, violate the requirement that all price regulations be generally fair and equitable."

And the five Democratic Senators added seven more objections to the anti-rollback proposal:

"It would mean a general price increase to the level of the highest prices. . . . It would mean an upward revision of the wage stabilization formula. . . . It would not necessarily prohibit, but might authorize severe farm roll-backs: . . . [I]f a sudden glut of the beef market broke the average price of beef to \$25 a hundredweight, OPS could step in with a \$25 ceiling. . . . It would invalidate all manufacturers' price regulations as well as all reporting work and expenses of over 75,000 manufacturers. . . . It would generally preclude passing on to consumers the advantages of drops in raw-material costs. . . . Large price increases would have to be granted those concerns 'caught short' by the general price freeze. . . . It might prevent the lowering of import prices. . . ."

Senate debate. This basic disagreement continued through the Senate debates. Chairman Maybank of the Banking and Currency Committee explained the anti-rollback provision:

"We have amended this new bill to make the January 25th freeze an equitable one. There may be no future roll-backs beyond this date in justice to the manufacturers and producers who cannot be expected to plan future operations under such uncertainties as those in which they are now living."³³

Senator Douglas led the opposition to the Committee proposal. He repeatedly pointed out that its principal effect would be the cancellation of the announced rollbacks on manufactured goods, and he attempted to persuade Senators from farm states to reject this aspect of the proposal. He argued:

"The amendment which the committee wrote into the bill has sometimes been referred to as the 'beef amendment.' The purpose of the amendment is said to be to protect beef from an additional 9-percent reduction. . . .

"Mr. President, I think the term 'beef,' in regard to the insertion of section 2, is a misnomer. I would call it the Trojan steer amendment. . . . [laughter]

"As I have said, the roll-back in the case of building materials would amount to \$1,000,000,000 net; in the case of chemicals,

33. 97 Cong. Rec. 7200 (June 25, 1951).

\$3,000,000,000; cutting tools, \$25,000,000; electrical equipment, \$55,000,000; and the possible roll-back in the case of rubber, \$150,000,000.”³⁴

As a possible compromise, he hoped to limit the effect of the rollback amendment to beef:

“[W]e can make an individual adjustment in the case of beef itself. That can be considered by means of separate amendment which can be supplied to the base period, so that if any particular hardships are suffered by the producers of beef, that situation can be taken into account. . . .

“However, I urge my good friends who come from the beef-producing States not to let themselves be used, in effect, as cat’s paws to rake the chestnuts out of the fire for the big manufacturers and monopolists who have enjoyed speculative gains since the attack on Korea.”³⁵

Senator O’Mahoney followed suit by introducing an amendment which would have exempted only cattle and sheep from future rollbacks.³⁶ Senator Wherry of Nebraska countered by proposing a complete prohibition on any ceiling reduction. This would have prevented all rollbacks on manufactured goods, and it might even have cancelled the 10-per cent beef rollback which had already gone into effect. The Wherry substitute was defeated, 49 to 39.³⁷

Thereafter the O’Mahoney substitute for the Committee amendment was defeated, 63 to 25; Senators from livestock states made up most of the minority.³⁸ Many Senators who wished to strike out the Committee proposal in its entirety voted against the O’Mahoney substitute hoping that the Committee proposal would be easier to beat than the O’Mahoney amendment. This strategy backfired, when the Committee amendment was approved, 61 to 26, with several of the supporters of the O’Mahoney substitute voting “Aye.”³⁹ The Senate then rejected Senator Moody’s amendment authorizing the *announced* rollbacks in the manufacturers regulation, as well as the second beef rollback.⁴⁰

Senate attempt to modify the anti-rollback amendment. At this point Senator Millikin introduced another amendment adding a new sentence to the Senate Banking Committee amendment: .

“Nothing in this paragraph shall prohibit the establishment or maintenance of a ceiling price with respect to any material (other than an agricultural commodity) which is based upon a period prior

34. *Id.* at 7213-5.

35. *Ibid.*

36. 97 Cong. Rec. 7430 (June 27, 1951).

37. *Id.* at 7433-5.

38. *Id.* at 7440.

39. *Id.* at 7443.

40. *Id.* at 7448.

to January 25, 1951, if such ceiling price reflects adjustments for increases or decreases in actual factory and labor costs, including reasonable allowances for other costs occurring subsequent to such period."⁴¹

Theoretically permitting rollbacks, the language of the Millikin amendment faintly resembled the general formula of the manufacturers regulations by envisaging ceilings based on a pre-Korea period with "adjustments for increases or decreases in actual factory and labor costs." But the amendment also required ceilings to reflect "reasonable allowances for other costs"—unlike the manufacturers regulation which recognized only direct cost increases. This recognition of *all* costs made Millikin's resemblance to the OPS formula quite illusory. Moreover, the manufacturers regulation had prescribed specific cut-off dates beyond which ceiling prices could not reflect cost increases. But the Millikin amendment, requiring continual ceiling adjustment to reflect cost increases regardless of their timing, would permit a continuous escalation of prices.

Presumably because the Millikin amendment theoretically softened the more rigid anti-rollback limitation adopted by the Senate Banking Committee, it was approved by voice vote.⁴² However, the Millikin amendment never became law. Its House version, the Wolcott amendment, was defeated.⁴³ What is most important now about the Millikin amendment is that with some modification it became enshrined in the second sentence of the so-called Capehart amendment.

The Cooley Amendment

On June 28, 1951, the Senate passed a bill extending the price control authority,⁴⁴ but the House was still considering this legislation. It was apparent, however, that the House bill would vary substantially from the Senate version, particularly with respect to the anti-rollback provision. Even were the House to pass a bill immediately, only two days would remain before the Act's expiration in which to hold a conference, reach agreement, and secure approval by both houses. In this context Chairman Spence of the House Banking and Currency Committee feared that disagreement at conference would bring about a hiatus in controls. Thus he persuaded the House to extend the 1950 Act for one month. A rider offered by Congressman Cooley prohibited rollbacks of any kind from becoming effective during July 1951;⁴⁵ this rider aimed to maintain the *status quo* until the Conference

41. *Id.* at 7436.

42. 97 Cong. Rec. 7551 (June 28, 1951). An attempt by Senator Morse to strike out the Millikin exemption for agricultural commodities was first rejected. *Id.* at 7549.

43. 97 Cong. Rec. 8501 (July 17, 1951); *id.* at A4664 (July 18, 1951).

44. 97 Cong. Rec. 8811 (July 20, 1951).

45. 97 Cong. Rec. 7678 (June 29, 1951).

Committee could work out a bill acceptable to both Houses. The Senate had no alternative but to accept the one month extension.⁴⁶

To preserve the *status quo* under the Cooley amendment, OPS on June 30, 1951, issued General Overriding Regulation 13,⁴⁷ providing that manufacturers who had elected to price under the manufacturers regulations would continue to do so. All other manufacturers were required to remain under the general freeze order. GOR 13 was revoked one month later⁴⁸ and new compulsory effective dates for the manufacturing regulations were scheduled.⁴⁹ But before these regulations could take effect, their effective dates were again postponed indefinitely⁵⁰ to await regulations implementing the Capehart amendment.

The Cooley amendment unquestionably had costly consequences. It permitted a comprehensive rollback prohibition to become embedded in the statute and in the thinking of the Congress. It had been assumed that haste would cause enactment of the most inflationary of the anti-rollback possibilities, and that time would permit the interested public to insist on the least inflationary provision. But by this time the issues had become so complex, and the course of legislation so involved, that the consuming public was either bewildered or apathetic. A lull in the forward advance of the price level contributed to the disinterest of consumer groups and the general public. The industrial groups, however, did not hesitate to press their advantage.

The Capehart Amendment: Individual Ceiling Adjustment

Out of the deliberations of the Senate-House conferees in the summer of 1951 came the so-called Capehart amendment, which was promptly accepted by both Houses as Section 402(d)(4) of the amended Act.⁵¹ This amendment consisted of four sentences.⁵² The first was based on the com-

46. 65 STAT. 110 (1951).

47. 16 FED. REG. 6435 (1951).

48. 16 FED. REG. 7546 (1951).

49. 16 FED. REG. 7590 (1951).

50. 16 FED. REG. 7931 (1951); *id.* at 9655; *id.* at 11482.

51. Senate, 97 Cong. Rec. 9230-4 (July 27, 1951); House, 97 Cong. Rec. 9357-67 (July 30, 1951).

52. "After the enactment of this paragraph no ceiling price on any material (other than an agricultural commodity) or on any service shall become effective which is below the lower of (A) the price prevailing just before the date of issuance of the regulation or order establishing such ceiling price, or (B) the price prevailing during the period January 25, 1951, to February 24, 1951, inclusive. Nothing in this paragraph shall prohibit the establishment or maintenance of a ceiling price with respect to any material (other than an agricultural commodity) or service which (1) is based upon the highest price between January 1, 1950, and June 24, 1950, inclusive, if such ceiling price reflects adjustments for increases or decreases in costs occurring subsequent to the date on which such highest price was received and prior to July 26, 1951, or (2) is established under a regulation issued prior to the enactment of this paragraph. Upon application and a proper showing of his prices and costs by any person subject to a ceiling price, the

prehensive anti-rollback provision sponsored by seven of the thirteen members of the Senate Banking Committee, except that the rollback ban was limited to non-agricultural commodities. The second sentence was based, with two important modifications, on the Millikin-Wolcott amendment which had been passed by the Senate but rejected by the House. The first modification allowed rollbacks to go into effect if established under regulations issued prior to July 31, 1951. This meant that the manufacturers' regulations which had been issued considerably before that time could go into effect according to their terms. The second modification prescribed a July 26, 1951, cut-off date for recognition of cost increases in place of the continuous escalation required by the Millikin amendment. The fourth sentence defined costs, for the purposes of the amendment, as *all costs*, except those found unreasonable or excessive.

In sum, the first, second, and fourth sentences taken together prohibit issuance of new regulations reducing ceiling prices of non-agricultural commodities below prescribed levels. Prices under such regulations may not be set below the lowest of (a) the price prevailing just before the date of issuance of the regulation or order establishing such ceiling price; (b) the price prevailing during the period January 25, 1951, to February 24, 1951, inclusive; or (c) the highest price between January 1, 1950, and June 24, 1950, inclusive, adjusted for increases or decreases in *all* subsequent costs with a July 26, 1951, cut-off.

These provisions had earlier received extensive discussion. It was Capehart's third sentence which made news. That started from the entirely new premise that every manufacturer or processor was entitled to an *individual* adjustment in his ceiling prices to reflect the highest pre-Korea price adjusted for cost increases up to July 26, 1951. The third sentence reads:

"Upon application and a proper showing of his prices and costs by any person subject to a ceiling price, the President shall adjust such ceiling price in the manner prescribed in clause (1) of the preceding [second] sentence. . . ."

Explaining the amendment, the Conference Committee stated:

"This roll-back amendment will permit the Administration to roll back the price of all gougers to a fair and reasonable level but will protect the fair and reasonable profit of those who have merely added to their pre-war prices the necessary and unavoidable costs of doing business which they have since incurred."⁵³

President shall adjust such ceiling price in the manner prescribed in clause (1) of the preceding sentence. For the purposes of this paragraph the term 'cost' includes material, indirect and direct labor, factory, selling, advertising, office, and all other production, distribution, transportation and administration costs, except such as the President may determine to be unreasonable and excessive." § 402(d) (4), 66 STAT. 298, 50 U.S.C. APP. § 2102(d) (4) (Supp. 1952).

53. H.R. REP. NO. 770, 82d Cong., 1st Sess. 24 (1951).

Somewhat unfairly to the senator from Indiana, it was the third sentence of Section 402(d)(4), quoted above—for which Senator Capehart was said to have been primarily responsible⁵⁴—that led to the identification of the entire subsection with his name. And it was this sentence which was to have the most drastic effect on the price program. What had happened was that the original legislative move to limit rollbacks had been used as a springboard for a more extreme revision: individual adjustments for manufacturers. The legislative process which developed the third sentence certainly did not represent Congress at its deliberative best. The sentence was shaped in the early morning hours without the knowledgeable debate or reception of agency testimony that might have been expected to precede adoption of an amendment with unprecedented dimensions and staggering economic and administrative implications.

Administrative answer: attempted repeal. The individual adjustment provision, affecting the pricing of millions of manufactured items, placed upon the agency an administrative task completely beyond the experience of price control in this country. To carry out the mandate of the third sentence and still honor the basic anti-inflationary purposes of the Act required delicate balancing. The most difficult job was allocation of overhead or indirect costs to a specific product. For example, how should multi-line manufacturers allocate expenditures for research, advertising, and office personnel to each specific product?

Consideration of these administrative problems, together with an estimate of the possible economic impact of the third sentence of the Capehart amendment, led the Administration to seek immediate repeal of the amendment. On August 23, 1951, less than a month after the enactment of the legislation, the President sent a special message to Congress recommending repeal.⁵⁵ The President said:

"The amendment will make price control regulations more complicated and endanger the development of dollars-and-cents ceilings which are so helpful both to business and to the consumer—and so important to effective enforcement of controls. . . .

"It is also clear that the Capehart amendment will shift more of the burden of our defense program to the shoulders of those least able to bear it. All along the line, under the Capehart amendment, business is protected. Business is told that it need not absorb rising costs. But no such assurance is extended to the consumer, the wage earner, and the people living on pensions and other fixed incomes. . . .

"The direct price-raising effects of this amendment are by no means the whole story. Equally serious are the enormous administrative and accounting burdens which this amendment imposes on both Government and business."

54. See 97 Cong. Rec. 9233 (July 27, 1951).

55. SEN. DOC. NO. 61, 82d Cong., 1st Sess. (1951).

Senators Ferguson, Nixon, and Welker promptly introduced a bill which would have repealed each of the provisions which the President criticized. Their stated purpose was to give the Administration what it wanted lest Congress be held responsible for legislating inflation.⁵⁶ Senator Maybank introduced a bill eliminating only the third sentence of the Capehart amendment; this later emerged as the Committee bill.

At the Committee hearings, Director DiSalle spoke out against individual pricing. He argued that this type of control placed a heavy computation and reporting burden on business; compliance is virtually impossible unless prices are known to buyers and sellers alike, and uniform pricing for manufacturers makes allocations and pricing at other levels easier.⁵⁷ Conceding that the General Manufacturers' Regulation and related OPS regulations contained Capehart's weaknesses, he pointed out that they were intended only as interim devices to relieve the inequities of the general freeze and to roll back excessive prices. Meanwhile, he explained, OPS was busy grinding out tailored industry regulations containing uniform ceiling prices that could be enforced.

DiSalle emphasized the difficulties of cost determination in individual pricing, a serious problem even on an industry basis. He noted seventeen different methods of overhead cost allocation⁵⁸ and gave an example of the wide differences in unit overhead costs which may result from applying disparate accounting methods. His statistics showed that overhead costs in general use not only are quite arbitrary but almost invariably overstate the actual cost in times of high production and demand. And he added:

"The new standard . . . has the power to override all other price control standards. . . .

"Once individual sellers are given the right to get their ceilings adjusted for all increases in their cost between certain dates, . . . it will in many instances be impossible to deny the same ceiling prices to their competitors even though the competitors cannot claim them individually on the basis of their own costs. . . ."⁵⁹

The Director also argued that the cost standard of the third sentence would supersede the basic "generally fair and equitable" requirement of the Act, because it would prevent "cost absorption" where this practice is normal:

56. 97 Cong. Rec. 10763-6 (August 23, 1951).

57. *Hearings before Senate Committee on Banking and Currency on S. 2092*, 82d Cong., 1st Sess. 2834-61, 2880-4, 2892-7, 2903-10 (1951); *Hearings before House Committee on Banking and Currency on S. 2170*, 82d Cong., 1st Sess. 2184-94, 2204-17, 2221-32, 2239-44, 2254-61 (1951).

58. LANG, *COST ACCOUNTANTS' HANDBOOK* 1062-3 (1951).

59. *Hearings before Senate Committee on Banking and Currency on S. 1928*, S. 2092, S. 2104, 82d Cong., 1st Sess. 2896 (1951).

"Business has practiced 'cost absorption' for years. In fact, American business has prided itself on its ability to absorb cost increases, yet maintain or lower its prices. By this technique it has increased its volume and expanded its markets. During a prosperous time like this, when volume is at peak levels and markets are expanding, it is not unreasonable to abide by this time-proven principle of sound business procedure."⁶⁰

Congressional response. The Senate and House Banking and Currency Committees were genuinely impressed by this appeal. It is true that the Senate Committee refused to recommend repeal of the anti-rollback provisions of the Capehart amendment because "it would leave too large an area of Administration discretion as to the extent of any and all roll-backs on individual commodities."⁶¹ Yet the Senate Committee did recommend repeal of the third sentence. Its report noted at some length the accounting difficulties involved in the computation of overhead costs for a multi-product firm, and concluded:

"[G]ougers would be tempted to exaggerate their cost increases on a product basis and the administrative agency might often be unable to detect such manipulation. The overwhelming majority of manufacturers, no doubt, would refuse to engage in any such practice. In protection of their legitimate interests, however, they would in every case of doubt have to use a somewhat higher rather than lower figure. . . . [I]t might lead to higher, and unnecessarily high, price levels."⁶²

The Senate Committee amendment would have given OPS the authority to determine a reasonable allowance for overhead costs in the administration of the second sentence of the Capehart provision, and would have made individual ceiling adjustments mandatory in hardship cases.⁶³

Four of the Republican members of the Committee dissented.⁶⁴ Their statement argued that the Committee amendment was inflationary to the extent that it failed to provide a cut-off date at July 26, 1951, as did the existing Capehart provision, and that it was also discriminatory because it did not require a passing on of cost increases up to that date. The proposal to make adjustments mandatory in hardship cases was termed a negative form of profit control and was criticized as meaningless, since OPS already was providing hardship relief in GOR 10. The four minority members, however, failed to secure Senate approval of a substitute bill continuing the Capehart amendment,⁶⁵ and the Committee bill was adopted 49 to 21.⁶⁶

60. *Ibid.*

61. SEN. REP. No. 796, 82d Cong., 1st Sess. 2 (1951).

62. *Id.* at 5.

63. *Id.* at 7-8.

64. *Id.* at 9-18. They also proposed an entirely new amendment, discussed *id.* at 17.

65. 97 Cong. Rec. 12861 (October 4, 1951).

66. *Ibid.*

Yet the repeal venture fizzled. The House Committee promptly considered the bill passed by the Senate and, with one minor variation, recommended its passage.⁶⁷ But the House Committee on Rules failed to grant the necessary rule to permit consideration of the bill in the short time remaining during the first session of the Eighty-second Congress. OPS now had to live with the Capehart amendment.

The Capehart Regulations

Throughout the entire period of legislative reconsideration, the agency had assumed that statutory change might not be forthcoming. Consequently, OPS officials had planned implementation of Capehart's third sentence, which would require the greatest number of price increases and which would cause substantial revision of the regulatory program. Available to OPS were CPR 22 and supplementary regulations, which provided individual adjustments and were intended to serve only until "tailored" controls could be issued. These regulations had never been effectuated on a compulsory basis. A task force working with the Director decided not to scrap the regulations but to adapt the Capehart formula to them.⁶⁸

Large and Small Manufacturers. On November 9, 1951, OPS issued the first two of the implementing Capehart regulations. These were Supplementary Regulation 17 to CPR 22,⁶⁹ which made available to all manufacturers governed by CPR 22 the individual pricing formula of the third sentence of the Capehart Amendment, and SR 4 to CPR 30,⁷⁰ which accomplished the same result for all manufacturers governed by CPR 30. Under both new regulations, labor and materials cost increases are to be determined in the same manner as under CPR 22 and CPR 30, except that the cut-off date for inclusion of cost increases is extended to the statutory date of July 26, 1951. With respect to the difficult problem of overhead, the new regulations contain a formula providing that each individual manufacturer can adjust for increases in such costs either by (a) reference to his entire business or, (b) in the event he allocated overhead to product lines in the past, using his established cost accounting method. The formula, however, does exclude certain non-recurring or capital expenditures, consistent with generally accepted accounting practices.

67. The House Committee also emphasized the difficulties of administering the individual adjustment provision, although it felt the Senate Committee's attempt to restrict individual relief to persons suffering financial hardship did not go far enough. See H.R. REP. No. 1186, 82d Cong., 1st Sess. 4, 6 (1951).

68. Director DiSalle described these efforts in detail to the Congress. See JOINT COMMITTEE ON DEFENSE PRODUCTION, PROGRESS REP. No. 10, 82d Cong., 1st Sess. 585-94 (1951).

69. 16 FED. REG. 11484 (1951).

70. 16 FED. REG. 11496 (1951).

The foregoing regulations are applicable to small as well as large manufacturers. In addition, OPS issued alternate regulations which small manufacturers can employ at their option. These regulations, SR 18 to CPR 22⁷¹ and SR 5 to CPR 30,⁷² allow manufacturers with net annual sales of less than one million dollars to determine a ceiling adjustment reflecting increased labor and material costs to July 26, 1951. Such manufacturers are *not* required to compute increases in overhead costs, but can simply adjust the previously-calculated ceilings determined under CPR 22 or 30. In this event, no credit will be received for increased overhead costs even though actually incurred. If the small manufacturer desires to claim a ceiling adjustment based upon increased overhead, he must follow the longer procedures contained in SR 17 to CPR 22 or SR 4 to CPR 30.

The agency also issued implementing Capehart regulations, GOR 20⁷³ and 21,⁷⁴ for manufacturers not governed by CPR 22 or CPR 30. GOR 20, characterized as the "small business overriding regulation," attempted to carry out the statutory mandate for concerns with limited accounting records and personnel. Under this regulation, concerns with net annual sales of less than \$250,000 determine their total cost increases solely by a comparison of their costs of doing business for the first halves of 1950 and 1951. In addition, a seller experiencing a wage increase between January 1, 1951, and July 26, 1951, can secure a further upward adjustment if his operating cost statement for the first half of 1951 fails fully to reflect the wage boost. Since the calculation is based upon the seller's entire business, it must be applied to all commodities which he manufactures.

GOR 21, sometimes referred to as the "general" Capehart regulation, is available to all small and large manufacturers who are not covered by CPR 22, CPR 30, by the services regulation (CPR 34), or by the automobile manufacturers regulation (CPR 1). Unlike the other regulations, GOR 21 contains no easy formula for translating cost increases into higher ceiling prices. Under this regulation a manufacturer must show, for each commodity, the cost increases occurring since the date of the highest price received in the period from January 1, 1950, to June 24, 1950; the cut-off for allowable cost increases is July 26, 1951. This is the sole Capehart regulation which provides for a complex and comprehensive statement of cost increases. In each of the other regulations some strictness of controls was sacrificed for simplicity, but, with respect to the diverse groups and industries governed by GOR 21, it appeared impossible to frame a simple regulation without conflicting with the basic statutory objective of controlling inflation.

71. 16 FED. REG. 11919 (1951).

72. 16 FED. REG. 12869 (1951).

73. 16 FED. REG. 12014 (1951).

74. 16 FED. REG. 12310 (1951).

Autos and services. These supplementary regulations cover all manufacturing areas of the economy except three. One of these is automobile manufacturing, to which OPS applied the Capehart formula in regulation SR 1 to CPR 1.⁷⁵ This regulation varies from SR 17 to CPR 22 because it grants considerably more flexibility to the industry. The manufacturer is not saddled with a precise formula, but is permitted to propose a method for calculating changes in net cost and for computing overhead. The propriety of this flexibility was based upon the small number of sellers in the industry and the different accounting systems maintained by several of the manufacturers. OPS proposed to carry the burden of examining the calculations of the manufacturers and consequently reserved the right to modify the ceilings calculated by the industry. OPS was generous in granting the Capehart relief claimed by auto manufacturers; in this area at least there is some evidence that the agency's willingness to adapt the Capehart regulation to the industry's convenience resulted in a sacrifice of price stabilization objectives.

The second uncovered area was that of industrial services. Although the Capehart amendment was by its terms applicable to "any person subject to a ceiling price," except sellers of agricultural commodities, the legislative history made it abundantly clear that this form of relief was not available to wholesalers and retailers. There was also some legislative history to indicate that among producers of services, only industrial producers were to benefit, although here the background was more ambiguous. Hence OPS determined to exclude distributors of materials, such as chain and department stores, from the operation of Capehart but to extend this form of relief to all sellers of services. By Amendment 2 to CPR 34,⁷⁶ issued January 9, 1952, the obligation to provide Capehart relief for sellers of services was acknowledged. CPR 34, which governs services, already contained an individual adjustment provision, and the Director simply made a finding that the amended provision "generally afforded so-called Capehart relief to the fullest extent practicable." The general standard in this provision provides for an increase in ceilings where impairment of the applicant's normal pre-Korean earnings threaten the company's effective operation, although causing no actual loss. The amendment to CPR 34 also provided that sellers believing themselves entitled to a further increase can present their case to OPS. The decision against working out a new adjustment formula rested upon two considerations: there was evidence that the existing individual pricing provision was, in actual operation, as generous as the Capehart amendment required; and because of the varied and sometimes inadequate cost accounting systems found in the service trades, the computations would be too difficult for the industry to make and too burdensome for OPS to analyze. Here, too, it is difficult to escape the conclusion that a liberal administration

75. 16 FED. REG. 12389 (1951).

76. 17 FED. REG. 288 (1952).

of the adjustment provision of CPR 34 may have sacrificed stabilization objectives in exchange for convenience to the industry and the Agency.

The third area to be covered by Capehart regulation was that of steel.

The steel dispute and the breach in the Industry Earnings Standard. The "general" Capehart regulation, GOR 21, had provided the steel industry with the individual adjustment machinery ordered by Capehart's third sentence. Yet the industry preferred an industry-wide ceiling increase which could be used in the alternative. Thus on April 25, 1952, OPS issued SR 100 to the GCPR, providing a general increase—for all steel products—of 2.6 percent over the general freeze ceilings.⁷⁷ This percentage increase was based upon the average amount of \$2.84 in Capehart relief which OPS accountants found appropriate for carbon steel. Most steel producers are governed by a voluntary pricing agreement entered into under Section 402(a) of the Act, rather than the mandatory freeze regulation. Yet, unfazed by the conceptual impossibility of attaching a supplementary regulation to a voluntary agreement, SR 100 provided the increase for all producers.

Capehart relief did not satisfy the steel industry. But its demands for higher ceilings ran into OPS assertions that the Industry Earnings Standard barred price increases over those required by Capehart.⁷⁸ As a result, steel representatives⁷⁹—along with witnesses from other industries⁸⁰—appeared at the Congressional hearings on the 1952 amendments to challenge the Standard. And Senators Chavez and Schoeppel and Congressman Talle attempted, unsuccessfully, to gain approval of bills which would by-pass the Standard. But OPS felt that the Senate Banking and Currency Committee, at least, favored the Standard and that it might even agree to alter Capehart in the agency's favor. While Capehart modification was not in fact forthcoming, the Senate Committee stuck by the Industry Earnings Standard in subsequent hearings concerning the Wage Stabilization Board's recommendations for the steel industry. And, at a later date, Congress refused to amend the statute to modify the Standard.

Damage to the Industry Earnings Standard came not from Congress but from the Administration, which was faced with the steel strike and with the industry's refusal to budge on a wage increase until it could be assured of a

77. 17 FED. REG. 3786 (1952).

78. See particularly the testimony of Roger Putnam, Economic Stabilization Administrator, and of Ellis Arnall, Director of Price Stabilization, in *Hearings*, *supra* note 6, at 1961-2471. See also statement of Ellis Arnall of April 16, 1952, before Senate Committee on Labor and Public Welfare, recorded in SEN. DOC. NO. 118, 82d Cong., 2d Sess. (1952).

79. Testimony of Ben Moreell in *Hearings*, *supra* note 6, at 2179-2233; and testimony of C. L. Austin in *Hearings before House Committee on Banking and Currency on H.R. 6546*, 82d Cong., 2d Sess. 1198-1236 (1952).

80. *Hearings*, *supra* note 6, at 235, 403, 422-5, 1007. See also *Hearings before House Committee*, *supra* note 79, at 976, 982-3, 1013-5, 1202-6.

price increase above Capehart. On August 2, 1952, only six days after Price Director Arnall had denied the Weirton Steel Company a \$5.50 per ton average ceiling boost,⁸¹ representatives of the union and the industry were called to the White House to agree upon a "package settlement." The outcome was an Office of Defense Mobilization "directive" to increase the ceiling on carbon steel by \$5.20 a ton,⁸² \$2.84 of which was attributable to the Capehart relief granted in April. On August 19, OPS revised its April action to include the added price increase.⁸³

A serious breach had been made in the Industry Earnings Standard. Although the directive stated that it was "based upon and limited to the facts of the steel industry," the obvious question was whether the breach could be contained. In appearances before congressional committees, Director Arnall had asserted that he would not give preferential treatment to the steel industry and that a crack in the price line would force equivalent increases in other areas.⁸⁴ But he did not remain in the Government long enough to decide that issue.

OPS decided to attempt to "contain" the price increases, limiting them to the industries directly affected by the steel price boost. GOR 35, issued on September 10, 1952,⁸⁵ covered purchasers of steel and other products whose ceilings had been raised by Revised SR 100 and related regulations: steel, pig iron, copper, and aluminum. GOR 35 provided secondary processors at each subsequent stage of production with an exact dollars-and-cents "pass through"; ceilings are to be adjusted automatically without any of the "cost absorption" which might otherwise be required by the Industry Earnings Standard. Subsequently, resellers of these products were permitted to adjust their ceilings in the same manner.

The efficacy of such "containment" will be determined in the coming months by Congress, the Emergency Court of Appeals, or the Administration. Unquestionably the steel situation presented a distinctive set of facts, and perhaps "containment," unsuccessful elsewhere, will work in this special factual context. In the winter of 1945 the Administration granted a similar steel price increase over the heads of stabilization agencies.⁸⁶ Yet this did not cause immediate ceiling increases in other areas of the economy. Even the demise of controls in 1946 was largely attributable to the so-called "meat

81. OPS Press Release, GPR No. 1541, July 18, 1952. This letter is reproduced in full as an appendix in Durham, *The Present Status of Price Control Authority*, 52 COL. L. REV. 868, 889 (1952).

82. This directive is set forth in the statement of considerations which accompanied the issuance of Rev. 1 to SR 100 to the GCPR. 17 FED. REG. 7585 (1952).

83. 17 FED. REG. 7585 (1952).

84. *Hearings*, *supra* note 6, at 1980-1; and *Hearings before House Committee*, *supra* note 79, at 29-34.

85. 17 FED. REG. 8179 (1952).

86. See CUTLER, PRICE CONTROL IN STEEL, STUDIES IN INDUSTRIAL PRICE CONTROL (HISTORICAL REPORTS ON WAR ADMINISTRATION: OPA) 37, 60-76 (Gen. Pub. No. 6, 1947).

shortage" of that year and to anti-controls sentiment which prevailed after V-J Day.

The Capehart Amendment in Retrospect

The individual pricing scheme of the third sentence of the Capehart Amendment came into existence along with a prohibition against price rollbacks. Yet even the announced rollbacks were aimed at pushing prices back only to the level of winter, 1951, rather than to the representative 1950 month which Congress itself had inserted in the Defense Production Act.

Both the rollback program (with its drastic congressional response) and OPS's own limitation on the rollbacks' retroactivity resulted in part from Administration action in the early days of the Act. The Administration must have been aware that early failure to impose controls might create a need for rollbacks later. And certainly the Administration knew that OPA had experienced great difficulty in effecting substantial rollbacks. The argument that a producer cannot plan his operations in terms of current costs and *past* selling prices is not only a persuasive argument but a sound one. The conclusion is that when prices are advancing, the failure to set controls renders economically and politically infeasible a subsequent attempt to capture the price level of a period too far in the past. Yet the Administration weighed this risk when it withheld controls in the fall of 1950.

In January, 1951, however, when OPS suddenly imposed controls, it might have effected a successful rollback by freezing prices as of a slightly earlier period, as OPA had done. But the general freeze was issued so hurriedly that the Administration gave little consideration to this possibility; it froze prices at the level of the immediate past period, December 19 to January 25.

Having permitted many producers to plan on the basis of the swollen prices reflected in the general freeze, OPS was in a poor position to effect rollbacks at a later date. Yet some cutback seemed necessary, and the answer to this rollback was the Capehart Amendment. Had Capehart included only the prohibition of rollbacks, its impact would have been minimal, for the rollbacks themselves were minimal. But the addition of the individual pricing provision of the third sentence in effect substituted a new pricing standard for manufacturers: it established a cost-plus basis for ceiling prices and allowed a forward advance all along the price front.

This new pricing standard gave a new direction to the regulatory program. OPS had originally planned but could not now effectuate industry-wide tailored regulations containing specific ceilings, which had proved enforceable during World War II. Instead, the agency now turned its attention to the post audit of individual ceilings largely self-determined by individual manufacturers. And OPS had neither time nor personnel to ease its burden by formulating industry-wide regulations at price levels reflecting the individual price increases allowed by Capehart. Thus a wholly new pattern of regulation

had been forced upon the agency by a simple sentence which did not receive full congressional scrutiny until *after* its enactment.

DISTRIBUTOR REGULATIONS AND THE HERLONG AMENDMENT

Early Distributor Regulations

Even before the general freeze was issued, it was apparent that the principal distributive trades could not "live" for long with any regulation freezing wholesale and retail prices as of a particular period. Changes in prices to consumers traditionally lag behind fluctuations in processors' prices, for wholesalers and retailers normally raise their prices only after receiving a notice of increase from the processor, and sometimes not until a purchase is made. Thus any past date chosen for a distributors freeze would presently damage those distributors who, on that past date, had not yet responded to a recent manufacturers' price increase.

During World War II, OPA had met this problem by the use of "margin" regulations, under which wholesalers and retailers were required to compute their ceilings by adding historical markups to actual cost of acquisition.⁸⁷ The OPS approach was similar. Under CPR 7,⁸⁸ the general retail regulation for consumer goods, distributors were permitted to add to invoice costs their individual margins received for particular categories of commodities on a specific listing date. In the "dry grocery" distribution field, OPS revived the OPA technique of establishing, for each specified food category, a percentage markup which was to be uniform for all sellers.⁸⁹ Since a similar program had been the subject of much litigation and some congressional criticism during World War II,⁹⁰ OPS anticipated attacks on its own regulations.

The Herlong Amendment: Percentage Markups

The distributors' complaint. Like the Capehart amendment, the Herlong amendment developed from fears that price control would inevitably enforce cost absorption, although this had not yet come to pass. OPS had refused, however, to let some distributors, such as rug⁹¹ and auto dealers,⁹² recoup their full *percentage* markups when manufacturers' prices increased; in these cases, OPS had authorized ceiling increases equalling only the exact dollars-

87. See PASCHKE, DISTRIBUTOR MARGIN CONTROL IN FOOD, PROBLEMS IN PRICE CONTROL: PRICING TECHNIQUES (HISTORICAL REPORTS ON WAR ADMINISTRATION: OPA) (Gen. Pub. No. 8, 1947); and CARSEL, WARTIME APPAREL PRICE CONTROL (HISTORICAL REPORTS ON WAR ADMINISTRATION: OPA) (Gen. Pub. No. 3, 1947).

88. 16 FED. REG. 5227 (1951).

89. CPR 14, 15, 16. 16 FED. REG. 10521, 10351, 10367 (1951).

90. *Safeway Stores, Inc. v. Bowles*, 145 F.2d 836 (Em. Ct. App. 1944), *cert. denied*, 324 U.S. 847 (1945).

91. SR 11 to GCPR, 16 FED. REG. 808 (1951).

92. Amendment 2 to SR 5 to GCPR, 16 FED. REG. 2548, 3010 (1951).

and-cents increase in the factory price. Distributor groups sought to prohibit this policy; they feared cost absorption would come next.

The distributors insisted that they sought no special treatment, that their only goal was to gain a legislative mandate permitting continuation of their customary pricing practices. It was customary, they said, for distributors to price merchandise by applying a fixed percentage markup to the cost of goods irrespective of increases in cost of acquisition. Nor did they seek to base their prices on a period when margins already were swollen, but were willing to settle for percentage margins received prior to the Korean outbreak. Their position was further buttressed by the fact that the basic OPA regulations, as well as the OPS consumer goods regulation (CPR 7), had been built around this pricing practice.

The distributors' argument, however, failed to account for the effect of manufacturers' price increases. The period between June, 1950, and consideration of the 1951 amendments had seen substantial increases in prices of many commodities. If legislation cancelled the rollback program, there would be further price boosts. Thus a guarantee of the same pre-Korea *percentage* margin would very likely swell the *dollar* margin. Moreover, the argument did not point out that distributors often shade their percentage margins as the cost base of merchandise climbs, and that unit distribution costs may decrease as demand builds up sales volume. Finally, the distributors' talk of cost absorption obscured the fact that agency refusals to allow the full percentage markup did not amount to enforced "cost absorption"; distributors were still allowed to add manufacturer dollar increases to their own prices. It was true that the bureaucracy had interfered with traditional pricing practices, but effective price control demanded such interference.

The amendment takes form. In contrast to the Capehart amendment, the Herlong amendment was the creature of the House. As originally introduced, the Herlong amendment required OPS to permit every individual distributor to compute his own ceilings by reference to his individual percentage markups prevailing during the pre-Korean month. All the arguments in favor of the percentage margin requirement were forcefully presented at the hearings conducted by the House Banking and Currency Committee. One of the most influential witnesses was Rowland Jones, Jr., president of the American Retail Federation, representing more than 1,700,000 non-food retail outlets. He proposed that Congress assure each individual retailer his pre-Korea margin.⁹³ But it was the maintenance of the percentage markup that Mr. Jones emphasized, as did witnesses representing automobile⁹⁴ and rug distributor in-

93. *Hearings, supra* note 27, at 1254, 1256-7; see *Hearings, supra* note 23, at 2025-6. See also testimony of G. L. Ward, representing the National Retail Dry Goods Association and Limited Price Variety Stores Association, *id.* at 2214-5.

94. *Hearings, supra* note 27, at 1186-7; *Hearings, supra* note 23, at 2118-19.

terests.⁹⁵ And the statement of the National Retail Hardware Association argued that ceilings based on dollars-and-cents markups amounted to "‘profit control’ rather than price control."⁹⁶

A similar group of witnesses had made similar arguments before the Senate Committee, but neither the Senate nor the House Committee embraced the Herlong proposal. The Senate Committee observed merely that the Act

"... in its present form now requires that due consideration be given to margins, among other factors, and your committee expects that such consideration will be given in establishing ceilings. Where the retailer's expenses ... go up with the cost of the product, consideration must, of course, be given to these increases in costs incidental to the primary increase in costs."⁹⁷

The issue was brought to the floor of both houses. The Senate, by a vote of 51 to 33, rejected the Dirksen amendment, which would have accomplished the aims of the Herlong measure.⁹⁸ In the House, where proponents of the measure sought out a sponsor from the majority party, the Herlong amendment was agreed to by voice vote.⁹⁹

The bills of both houses concerning the Act's extension then went to Conference Committee, where a compromise on the Herlong issue was reached which failed to satisfy many of the amendment's proponents.¹⁰⁰ The Conference eliminated the requirement of *individual* pre-Korea margins, permitting application of Herlong to *groups* of sellers and commodities, and it made the pre-Korea percentage margin guarantee inapplicable to regulations already outstanding. The first change allowed OPS to set uniform dollars-and-cents ceilings for distributors, so long as the percentage markup requirement was met, thus bringing enforcement and administration of distributor regulations within the realm of possibility. The second change, making Herlong applicable only to regulations "hereafter" issued, prevented an automatic increase in food prices, for retail food regulations issued in the spring of 1951 were based upon World War II margins rather than upon pre-Korea margins.¹⁰¹ In addition, the Conference added to the amendment a provision which in effect required sellers to show evidence of their pre-Korea experience. This limited the agency's administrative burden and made it possible to discuss price increases on the basis of actual facts rather than vague industry claims as to past margin experience. Both houses promptly adopted the bill containing the Herlong compromise.

95. *Hearings, supra* note 27, at 1317-34.

96. *Id.* at 1983.

97. SEN. REP. No. 470, 82d Cong., 1st Sess. 15 (1951).

98. 97 Cong. Rec. 7554 (June 28, 1951).

99. 97 Cong. Rec. 8745 (July 20, 1951).

100. HOUSE REP. No. 770, 82d Cong., 1st Sess. 25 (1951).

101. Statement of considerations accompanying CPR 14, 15, and 16. 16 FED. REG. 2725 (1951).

Request for repeal. Although the agency fared better in the Conference Committee on the Herlong amendment than it had on other crucial amendments, the percentage margin provision was so inflationary that the Administration sought its immediate repeal. In his special message, President Truman had harsh words for the Amendment:

"The maintenance of percentage margins in this fashion is not needed to assure the distributor a fair deal under price control. What is needed—and what the stabilization agencies were providing—is a proper recognition of increases in distributors' operating costs. But there is no reason why distributors should be allowed to make wind-fall commissions to cover increased operating costs that do not actually occur. There is no justification for compulsory universal application of customary percentage margins, which is what the new law requires."¹⁰²

Although no bill was introduced in either house to repeal or modify the Herlong amendment, Price Director DiSalle nevertheless urged both Senate and House Committees to recommend such legislation.¹⁰³ Conceding that where operating expenses increase, a simple "pass-through" of the dollar increase in merchandise cost would be insufficient, he pointed out that in the more typical situation, operating costs per dollar of sales either decline or increase at a much smaller rate than the cost of merchandise. DiSalle also suggested that the percentage margin requirement discriminated against certain distributors—dealers in milk and industrial materials, for example—who use dollars-and-cents markups. "Since these distributors do not customarily use a percentage markup," he explained, "[the amendment] has no application and OPS regulations may properly continue the dollars-and-cents markup used by these distributors." Yet he predicted that the factual determination that distributors did not use percentage margins in the base period might stimulate continual controversy.¹⁰⁴

But these urgings failed to move Congress. OPS now had to accept the Herlong amendment.

Implementation of the Herlong Amendment

The task of conforming existing regulations to Section 402(k) of the Act (the Herlong amendment) started even before hope was lost over the repeal request. Beginning in August, 1951, OPS issued a series of amendments governing distributor sales of machinery, brass mill products, pork, beef,

102. SEN. DOC. No. 61, 82d Cong., 1st Sess. 4 (1951).

103. *Hearings before Senate Committee on Banking and Currency on S. 2672*, 82d Cong., 1st Sess. 2861-4, 2880, 2897-9, 2903 (1951); *Hearings before House Committee on Banking and Currency on S. 2170*, 82d Cong., 1st Sess. 2194-7, 2220 (1951).

104. *Id.* at 2196.

automobiles, spirits, and wine.¹⁰⁵ In each case, OPS could have disregarded Herlong by retaining the original regulation, since these commodities were under control prior to the Amendment's passage. But it was necessary to change regulations for other reasons, and the resulting revision had to reflect the guaranteed percentage markup. By March, 1952, the Agency had issued nearly fifty regulations based on Herlong,¹⁰⁶ and the process has since continued.

The Safeway decision. The "dry grocery" regulations did not receive immediate attention as a result of the Herlong amendment. The specific percentage margins in these regulations were tied to a World War II period rather than to the pre-Korea period. Even before Herlong's enactment, OPS had announced that it would survey pre-Korea food store margins and, where appropriate, would substitute these margins for those employed in existing regulations. The food industry had indicated that the survey would disclose changed relationships among margins for various commodities, partly as a result of post-war marketing developments. But technical statistical problems and manpower shortage slowed collection and analysis of the data.

This lack of progress distressed the food industry, and particularly the chains, who believed that the survey would show that their pre-Korean margins exceeded those in the existing regulation (CPR 15).¹⁰⁷ These sellers could not rely on the Herlong amendment so long as OPS retained CPR 15, since the regulation antedated and was thus unaffected by Herlong. Deciding not to wait on the OPS survey, one of the large chains seized upon the ingenious argument that the Capehart amendment required individual price adjustments for distributors. In brief, the argument was that Capehart did not exclude retailers, and that in fact the third sentence was expressly applicable to "any person subject to a ceiling price." The statute was so clear and unambiguous, it was said, as to preclude resort to its legislative history. And in any event, the history was at least ambiguous as to the scope of Capehart.

The Director denied a protest based on this claim, asserting that the legislative history of both the 1951 amendments and the Capehart repeal bill supported the exclusion of retailers.¹⁰⁸ The major weakness of the OPS position rose from the unsuccessful Senate bill modifying Capehart, which expressly limited the anti-rollback provisions "to the sales of manufacturers or processors of any materials or the charges for industrial services. . . ." This provision implied that without an express limitation Capehart covered distributors. Thus it was not too surprising that the Emergency Court of

105. In JOINT COMMITTEE ON DEFENSE PRODUCTION, PROGRESS REP. No. 10, 82d Cong., 1st Sess. 591-4 (1951), Price Director DiSalle summarized these regulatory actions.

106. *Hearings*, *supra* note 6, at 1288-90.

107. *Hearings before House Committee*, *supra* note 79, at 519.

108. Safeway Stores, Inc., OPS Docket No. 1015-1-P, November 29, 1951.

Appeals held against the Director, in spite of the legislative history apparently favoring the OPS position.¹⁰⁹ In *Safeway Stores, Inc. v. Arnall*,¹¹⁰ Judge Maris wrote:

"The language . . . is perfectly clear and unambiguous. It applies, according to its express terms, to ceiling prices with respect to 'any material. . . .' This is the broadest kind of definition and plainly includes materials sold at wholesale or retail."

The Court's opinion pointed out that if the language was too broad, "the way is open to correct the error by amendatory legislation."

Congress "reverses" the *Safeway* decision. Fortunately Congress, when the decision came down, was considering the 1951 extension legislation. Director Arnall promptly sought assistance in letters to the Chairmen of the Senate and the House Committees requesting amendment.¹¹¹ He noted that 560,000 retail food stores and 200,000 non-food retailers could secure ceiling increases under *Safeway*, posing a threat of further rises in the cost of living and an administrative task of staggering proportions. He added that under Capehart it would be "virtually impossible to establish or maintain dollars-and-cents ceilings or standard markups in the distributive trades—unless the ceiling were at such high levels as to make a mockery of stabilization." The Senate Committee speedily responded to the Director's appeal by adding a sentence to the Capehart amendment making it inapplicable "in the case of a seller of a material at retail or wholesale."¹¹² Although the House apparently never considered the matter, the report of the Conference Committee noted that the Senate version was accepted,¹¹³ and the amendment passed. Prompt correction of the *Safeway* decision depended on the fortuitous circumstance that Congress was considering necessary extension legislation; it might otherwise have proved difficult to generate sufficient congressional energy to save the distribution regulations.

1952 addition to the Herlong amendment. But Congress did not ignore the pleas of the "dry grocery" distributors, who had so far not benefited from the Herlong amendment.¹¹⁴ Because the "dry grocery" regulation pre-

109. The Associated Press quoted Senator Capehart as being surprised by the decision. Evidently Safeway was somewhat surprised too, for in March, 1952, its secretary-treasurer, representing the National Association of Food Chains, recommended that the language of the Capehart amendment be changed to make it applicable to retail grocers. *Hearings, supra* note 78, at 583.

110. 196 F.2d 510 (Em. Ct. App. 1952). On October 13, 1952, the Supreme Court granted review in this case and simultaneously remanded it to the Emergency Court of Appeals for consideration of the 1952 addition to the Capehart amendment, discussed *infra*. *Arnall v. Safeway Stores, Inc.*, 73 Sup. Ct. 19 (1952).

111. OPS Press Release, GPR No. 1435, May 9, 1952.

112. SEN. REP. NO. 1599, 82d Cong., 2d Sess. 23 (1952).

113. HOUSE REP. NO. 2352, 82d Cong., 2d Sess. 16 (1952).

114. *Hearings before House Committee, supra* note 79, at 553.

ceded Herlong, the Senate Committee concluded that "this limitation may discriminate between some retailers governed by regulations issued prior to [Herlong's] effective date and those governed by new regulations."¹¹⁵ The House Committee concurred.¹¹⁶ These observations were correct, but an amendment making Herlong applicable to all past regulations would lead the way to higher food prices.¹¹⁷ Yet Congress approved the retroactivity provision, and OPS implementation followed. On August 27, 1952, OPS issued a general order, GOR 33,¹¹⁸ applicable to all fields except automobiles, which contains a finding that all existing regulations meet the requirements of the Herlong amendment. But GOR 33 also provides a procedure for further relief; any distributor believing that existing regulations do not meet the Herlong standards, as modified in 1952, need only file an application containing evidence as to the proper margin or charge.

Interpretive problems. The legal puzzles posed by the Herlong amendment are legion. Perhaps the most difficult of these is interpretation of the term "margins." Subsequent to Director DiSalle's statement that Herlong's requirement of customary percentage markups would not apply to industries where dollars-and-cents markups were traditional, it was discovered that this policy barred relief for some trades whose use of dollar markup terminology obscured actual employment of percentage margins. But once it was conceded that Herlong protected these trades, it became administratively infeasible to require the true dollar markup trades to use a base period other than the pre-Korean month specified in Herlong. Thus, to avoid charges of discrimination, OPS decided to allow an industry its customary pre-Korea markup regardless of the markup's form. Yet even this formulation did not satisfy all dealers in the bituminous coal industry, which was receiving dollar markups; one of the trade associations went to the Senate Committee, alleging that it should receive percentage markups. Supported by another and larger retail coal association, the Director replied that the industry had always used dollar-markups, and that to employ percentages would ignore historical pricing practices and contradict the language and intent of the Herlong amendment.¹¹⁹ As an outgrowth of this testimony, the House successfully recommended that

115. SEN. REP. NO. 1599, 82d Cong., 2d Sess. 26 (1952).

116. HOUSE REP. NO. 2177, 82d Cong., 2d Sess. 25 (1952).

117. See *Hearings before House Committee*, *supra* note 79, at 1499, 1503, 1606.

118. 17 FED. REG. 7852 (1952).

119. *Hearings*, *supra* note 6, at 1269. The Executive Secretary of the American Retail Coal Association wired Senator Maybank that "[r]etail coal has always historically been sold upon the basis of dollars and cents markups. It is impracticable if not impossible to apply percentage markups to coal sold at retail for the reason that every variation in mine prices either up or down would require a corresponding adjustment in retail margins and prices. The retail coal industry is in a depressed financial condition and is in need of OPS consideration for relief to compensate for increased labor costs but it would not obtain such relief by application of the Herlong Amendment and in fact to apply it in the area we represent would have the immediate effect of cutting rather than raising retail

Congress write the agency's approach into the Act, thus guaranteeing the continuation of established pricing practices.¹²⁰

A related problem has been to determine the concept of what quantitative margin is "customary." If an industry's margins in the pre-Korean period fluctuated wildly, any one figure is not "customary." Just how firm and established must a margin be before it is "customary"? Similarly, if some members of an industry used dollar margins, while others used percentages, what are the agency's responsibilities under the Herlong amendment? Although OPS has attempted to supply consistent answers to these questions, their final resolution must await litigation or further congressional action.

The Johnson Amendment: Individual Automobile Markups

The plea for individual margins. Some members of the distributive trades felt they had received shabby treatment from the 1951 Conference Committee when it made the Herlong amendment available to "groups of sellers" rather than to individual sellers. The testimony and the debate, particularly in the House, had stressed the need for guaranteed *individual* margins, such as OPS itself had employed in the consumer goods regulation (CPR 7).

The 1952 struggle for a congressional mandate requiring individual markups resembled the debate of the previous year. Automobile dealers, however, were more specific, claiming that the failure to use individual margins conflicted with the basic Herlong purpose of requiring maintenance of past pricing practices. The existing automobile regulation contained a uniform charge for "preparation and conditioning," which dealers could add to the price of the fully-equipped automobile in computing ceiling prices. Dealers claimed that this charge actually varied from \$15 to \$150 per car, depending upon geographical location, the make of the automobile, and the functions performed by particular dealers.¹²¹

The Lone Star statute. The Senate Committee's bill did not provide for individual markups for any groups of sellers. But for one group, automobile dealers from Texas, relief was on its way. Proponents of special provisions for auto dealers had been busy, and on July 12, 1952, Senator Lyndon Johnson of Texas offered an amendment to allow Texas merchants individual margins. The approach, however, was oblique. The Supreme Court of Texas had once held that use of manufacturers' suggested retail prices, upon which the OPS regulation was based, conflicted with the Texas antitrust statute.¹²²

margins and would spell immediate disaster to our industry. It is our opinion that the OPS interpretation of the applicability of the Herlong Amendment to the retail coal industry is correct and realistic and our organization supports the statement on this subject to be given your committee by Ellis Arnall, Director of OPS. . . ."

120. HOUSE REP. NO. 2177, 82d Cong., 2d Sess. 5 (1952).

121. *Hearings, supra* note 6, at 425-9, 1430-3; see *Hearings before House Committee, supra* note 79, at 1183.

122. See *State v. Ford Motor Co.*, 169 S.W.2d 504 (Tex. Civ. App. 1943), *aff'd*, 142 Tex. 5, 175 S.W.2d 230 (1943).

The Johnson provision would require OPS to recognize established pricing patterns where "the antitrust laws of any state have been construed to prohibit adherence . . . to uniform suggested retail resale prices. . . ." Customary pricing practices in Texas had taken into account preparation and conditioning charges, which varied from dealer to dealer. Now permitted by the Johnson provision to fall back on these practices, Texas dealers henceforth could price on the basis of individual margins. The Senator explained that this, precisely, was his intention:

"The OPS has assured the junior Senator from Texas that if this amendment is adopted there can and will be no question that OPS will grant to the seller of automobiles and all the automobile dealers of Texas their customary percentage margins. . . ." ¹²³

His amendment, the Senator stated, was acceptable to Senators Maybank and Capehart. Without further debate the Senate accepted it by voice vote.¹²⁴ Four days later a House committee report concurred.¹²⁵ With both houses in agreement, the automobile amendment passed without further debate.

The House, however, tried to go one step further. The Cole amendment, accepted 231 to 164, allowed *all* distributors an individual markup.¹²⁶ In urging his provision, Congressman Cole's only argument was that existing distributive regulations discriminated against grocery stores.¹²⁷ OPS considered his amendment particularly damaging, because it would forbid use of uniform markups and dollars-and-cents ceilings crucial to effective food price controls. The Conference Committee, however, threw out the Cole amendment, noting that OPS could permit individual markups as a matter of discretion.¹²⁸

Implementation of the automobile amendment. Congress having saved the remaining authority for a rational food distribution program, OPS now turned to the revision of the automobile regulation. At the time auto dealers were urging their special amendment, it had been assumed that ceilings based on margins used during the pre-Korean month would satisfy the industry. But shortly after enactment of the Johnson amendment it became clear that a pre-Korea basis would force rollbacks for dealers whose margins had expanded in the post-Korea months. Thus the revised dealer regulation,¹²⁹ adopted August 18, 1952, allowed sellers to base ceilings on individual margins in use in either of two base periods: (1) the pre-Korean month (May 24 to June 24, 1950); or (2) the general freeze period for dealers (January

123. 98 Cong. Rec. 7206 (June 12, 1952).

124. *Ibid.*

125. HOUSE REP. No. 2177, 82d Cong., 2d Sess. 25 (1952).

126. 98 Cong. Rec. 8346 (June 26, 1952).

127. 98 Cong. Rec. 8196 (June 25, 1952).

128. HOUSE REP. No. 2352, 82d Cong., 2d Sess. 20 (1952).

129. Rev. 1 to CPR 83, 17 FED. REG. 7572 (1952).

26 to February 24, 1951). If during the dealer's selected period he added certain extra charges, such as those for preparation and conditioning, this practice could now be continued. Familiarity of dealers with their extra charges as determined under the general freeze regulation supplied an additional reason for setting up the optional base periods advocated by the industry. The regulation was thus even more generous than the Johnson amendment, which had demanded only pre-Korea margins.

The generosity of the amendment and the new regulation created legal and administrative problems making it impossible to restrict Johnson relief to Texas dealers alone. Many Texas dealers would gain a clear price advantage over dealers in other states, which would be particularly detrimental to legitimate operators in neighboring states. Yet ceiling-violators in nearby states could easily frustrate OPS enforcement; they could defend on the ground that the sale took place in Texas. And non-Texas Congressmen would surely balk at a system discriminating against their constituents. Finally, in a tight market, a price boon to Texas merchants could channel more autos into Texas markets, disrupting normal distribution and jeopardizing the prosperity of non-Texas dealers. Strict geographical application of the Johnson amendment was a Pandora's box OPS could ill afford to open.

Even issuance of the new nationwide auto regulation did not terminate the struggle between the agency and the industry. There remained outstanding civil suits against certain dealers for alleged overcharges under earlier regulations providing a uniform nation-wide markup. In these and related administrative proceedings¹³⁰ the industry asserted in its defense that, even prior to the enactment of the Johnson amendment, Herlong required geographic differentials based upon pre-Korea margins. Despite the obsolescence of the challenged regulations, OPS could not withdraw its civil suits without inviting other industries to violate regulations in anticipation of legislative relief. These cases and other proceedings challenging outdated regulations now pend before several district courts and the Emergency Court of Appeals.¹³¹

Looking Back at Herlong

The Herlong amendment wiped out the agency's early attempts to limit distributor price increases to the exact dollars-and-cents increment in manufacturer prices; the amendment forced OPS to permit percentage markups regardless of the cost base. Thus distributors were allowed to pyramid every increase at the producer level. In 1951, Congress did refuse to make Herlong retroactive, which would have compelled percentage markups in food distri-

130. Paul M. Harmon, OPS No. 1083-3-P, filed April 15, 1952.

131. *Massy v. Woods*, Crim. No. 603, Em. Ct. App., June 13, 1952 (direct complaint allowed by U.S. District Court for Minnesota); *Tribe v. Woods*, Crim. No. 606, Em. Ct. App., July 21, 1952 (direct complaint allowed by U.S. District Court for Utah).

bution. But the 1952 amendments placed all distributive trades in the same position, thus assuring increased retail food ceilings at some subsequent date.

Although OPS opened its distributor program by issuing individual percentage margin regulations in the non-food area, some agency officials anticipated that these could some day be replaced by uniform markups like those in the food area. Uniform markups would have permitted harmonization of ceilings in each community; such a program seemed essential to maintenance of public support and understanding. Enactment of Herlong, however, made formulation of new controls in the area difficult, thus wedding the non-food regulatory program to the individual margin technique, which is virtually unenforceable.¹³² And although the original automobile regulations were formulated on a national and regional basis, the 1952 Johnson amendment led inevitably to a revised regulation requiring individual markups for dealers. Congress, however, has not required OPS to drop the uniform markup system for food distributors in favor of individual markups, although the pressure from food sellers has been great. As a result, only in the food field can OPS effectively enforce its distributor regulations and provide a significant retail program worthy of a sizeable allocation of OPS manpower.

THE MEAT PROGRAM

Early Regulation

Legislative and administrative treatment of meat industry problems diverges significantly from the approach to problems of other manufacturers and distributors. Meat's special status results not only from unique economic conditions but also from two influential political factors: (1) the tendency of consumers and organized urban groups to test the effectiveness of controls by the price of beef; and (2) the influence in Congress (and particularly in the Senate) of the livestock producing states. Thus any viable program must receive support from both consuming and livestock producing groups. But meat regulations must also be fair to slaughterers and processors, not only for the purpose of insuring the "generally fair and equitable" character of meat rulings, but also to prevent controls from blocking efficient distribution of meat.

OPA experience. The OPS meat program sought to gain from OPA's experience.¹³³ Early in World War II, OPA used ceilings only for prices

132. See testimony of Price Director DiSalle in *Hearings before House Committee*, *supra* note 57, at 2194-7.

133. Much of the OPA experience is recounted in BINGHAM, PRICE POLICY AND THE FEED-FOOD PROBLEM, PROBLEMS IN PRICE CONTROL: CHANGING PRODUCTION PATTERNS (HISTORICAL REPORTS ON WAR ADMINISTRATION: OPA) (Gen. Pub. No. 9, 1947); RUSSELL & FANTIN, *Livestock Slaughter Controls*, in STUDIES IN FOOD RATIONING (HISTORICAL REPORTS ON WAR ADMINISTRATION: OPA) 315-403 (Gen. Pub. No. 13, 1947); and Hyman & Nathanson, *Judicial Review of Price Control: The Bdtile of the Meat Regulations*, 42 ILL. L. REV. 584 (1947).

charged by slaughterers and distributors, believing that ceilings on slaughterers' sales would prevent substantial rises in livestock prices. Yet OPA found that ceilings were not enough. Lax standards for federal licensing of slaughterers led many new and irresponsible processors into the field. The difficulty of enforcing price ceilings on the sales of these processors opened up an inviting avenue for black market operations. Their illegal profits enabled these newcomers to bid up livestock prices and thus attract meat away from established processors and the normal distribution channels. Soon the more established slaughterers, deprived of supplies, found themselves unable to achieve processing volumes—and thus efficiencies—sufficient to earn the margin allowed them under the Industry Earnings Standard. As a result, these processors pressed for ceiling boosts.

This wartime chain of events provoked two further steps. First, OPA established a "drove compliance" ceiling on *livestock* prices. This was an overall ceiling covering all grades of cattle, with cost of the total number of head purchased in a given period becoming the ceiling price to slaughterers.¹³⁴ Second, OPA imposed slaughtering quotas. This second step attempted to restrict the importance in the market place of the new slaughterers who were bidding up livestock prices and rechanneling distribution. But belated use and abrupt legislative termination of livestock price ceilings and quotas prevented OPA from fully testing their effectiveness and fairness.

OPS approach. Rejecting OPA's initial, and faulty, assumptions, OPS decided at the start to use "drove compliance" ceilings on livestock purchases and to assure beef distribution through established and legitimate channels.¹³⁵ Thus, simultaneously with the issuance of the processor-wholesaler regulation (CPR 24),¹³⁶ and the retailer regulation (CPR 25),¹³⁷ the Director issued a livestock purchase regulation, setting "drove compliance" ceilings (CPR 23),¹³⁸ and a distribution regulation (DR 1),¹³⁹ restricting the beef slaughter quota to that enjoyed during a normal period. This quota regulation was shortly supplemented by DR 2,¹⁴⁰ which required grademarking of

134. Thus the liability of packers is tested by the aggregate cost for all cattle purchased in a given period. See 13 QUARTERLY REPORT OF THE OFFICE OF PRICE ADMINISTRATION 2-4 (1945).

135. The authority for quotas is contained in Title I (allocations) of the Defense Production Act, while the statutory basis for price and wage stabilization is in Title IV. Originally the President delegated the authority to allocate meat to the Secretary of Agriculture by Exec. Order 10161, 15 FED. REG. 6105 (1950). In turn this authority was transferred to the Economic Stabilization Agency. Defense Food Delegation No. 4, 16 FED. REG. 1272 (1951). And finally it was given to OPS. ESA Gen. Order No. 5, 16 FED. REG. 1273 (1951).

136. 16 FED. REG. 11813 (1951).

137. 16 FED. REG. 9866 (1951).

138. 16 FED. REG. 3696 (1951).

139. 16 FED. REG. 4456 (1951).

140. 16 FED. REG. 3772 (1951).

meat by slaughterers. In the price sphere, OPS looked beyond current ceilings and provided for three future rollbacks of live cattle and distributor ceilings equalling nearly 20 percent—10 percent to be effective at the end of May and the remainder on the first of August and October, 1951. The first reduction was applicable only to live cattle, originally exempted from the general freeze; it attempted to obviate an early price increase to consumers. Under the general freeze, which did not cover live cattle, farm prices to slaughterers had advanced steadily to the point where processing and, to some extent, distributing margins had become too slim. Thus the alternative was to increase the ceilings of slaughterers and distributors or to reduce their materials costs, as OPS proposed to do.

The Fugate Amendment

The legislative struggle of 1951 encompassed both the price and allocation aspects of the meat program. Concern in the House of Representatives over the announced rollbacks on livestock and beef led to the Fugate amendment, which was approved by the House Committee.¹⁴¹ This amendment prevented rollbacks on agricultural commodities below 90 percent of the farm price received (by grade) on May 19, 1951, as determined by the Secretary of Agriculture. The intention was to cancel the second and third announced rollbacks on beef ceiling prices. When in late June, 1951, it was necessary for Congress to enact a one-month extension to prevent a break in controls, the Cooley amendment barred rollbacks during that month. Then in late July, 1951, the Conference Committee added the Fugate amendment to Section 402(d)(3) of the Act in addition to the comprehensive anti-rollback Capehart amendment, which became Section 402(d)(4).¹⁴²

The Administration offered little resistance to the Fugate amendment. It was part of a House Committee bill largely friendly to price control. This bill rejected the anti-rollback provision for manufacturers but also strengthened the Act's enforcement provisions and authorized differential subsidies. Moreover, the bill tied ceilings not to monthly determinations of parity prices but to parity price figures computed by the Secretary of Agriculture at the beginning of the marketing season. This provision, it was anticipated, would stabilize the administration of price control on pork, since parity prices for hogs are subject to sharp changes throughout the year.

The Butler-Hope Amendment: The Attack on Slaughter Quotas.

The real legislative fight, however, concerned quotas, not ceilings. Both houses entertained an identical proposal, known as the Butler-Hope amendment, which provided simply: "No restriction, quota, or other limitation

141. HOUSE REP. NO. 639, 82d Cong., 1st Sess. 27 (1951).

142. HOUSE REP. NO. 770, 82d Cong., 1st Sess. 23-4 (1951).

shall be placed upon the quantity of livestock which may be slaughtered or handled by any processor."

Formal objections. In both houses, two general objections were voiced against the slaughter quota program. The most telling charge was that it limited livestock marketings and therefore would create beef shortages; the other objection was that it prevented new persons from entering the slaughtering business. OPS attempted to answer these formal objections by pointing out that they resulted from a misunderstanding of the regulations and their techniques.¹⁴³ Under DR 1, packers were prohibited from slaughtering in any given month a greater *proportion* of the total available livestock than they slaughtered in the same month in 1950. This system required OPS to estimate total future monthly marketings in order to assign individual quotas. Thus if total marketings of beef were expected to be 90 percent of total marketings for the same month in 1950, each slaughterer would receive a quota equal to 90 percent of what he slaughtered in that month during 1950. The use of a percentage less than 100 led some observers to conclude that OPS was limiting total current marketings. The agency attempted to explain that this system was merely designed to divide livestock equitably among slaughterers on the basis of the previous year's marketings, and that under DR 1 any increase in total marketings would increase the amount of livestock available for individual slaughterers. The agency also pointed to the provision of DR 1 permitting local quota adjustments where current marketings were running higher than the national average.

In responding to charges that DR 1 was unfair to new business, the agency conceded that it intended to distinguish between new and established slaughterers. However, DR 1 did provide for slaughterers who had invested in facilities prior to the regulation even though they did not slaughter in 1950. And entirely new entrants were to be granted quotas upon a showing that the locality could not obtain the entrant's products from other sources and that the new establishment would facilitate production and orderly distribution of meat. It was hoped that these special provisions would be sufficiently stringent to keep potential black market operators out of the industry, while at the same time sufficiently generous to new enterprises to save the regulation from political attack or from legal challenge.

The major premise. But behind the formal objections to the program was the belief that it tended to trim the farm producer's return from livestock. This belief was articulated in some of Senator Butler's arguments in support of his amendment:

"These quotas were instituted not in order to divide livestock equitably among the various meat packers. The principal purpose of the Government officials—probably their sole purpose—was to knock down the price of cattle and hogs. The authority assumed by

143. See SEN. REP. NO. 840, 82d Cong., 1st Sess. 4-5 (1951).

the OPS under this Section [101] has been used as an indirect means of price control. . . .

"By imposing these slaughter quotas, the OPS is able to prevent meat packers from buying as many head of livestock as they otherwise would. In effect, it takes buyers out of the market, and thereby prevents the normal action of demand and supply from bidding the price of hogs up to parity. . . ." ¹⁴⁴

It was difficult for OPS to argue that the quota program did not impair farm producers' profits. Since livestock prices could rise without causing an immediate price increase for items livestock growers must buy, producers would gain from unlimited bidding by slaughterers. To the producers it was not a sufficiently persuasive answer that OPS is in business to block increases in prices—including livestock prices. In this setting OPS could only hope that public acceptance of the meat program would be enthusiastic enough to convince Congress that quotas were essential.

Butler-Hope passes. It was a Senator from a livestock-producing state, Clinton Anderson of New Mexico, who rose to challenge the Senate group which was determined to ban meat quotas. Anderson had closely observed OPA's experiences with slaughter control. He had been Secretary of Agriculture in the last gasping days of OPA; and earlier, in 1945, he had headed the Special House Committee to Investigate Food Shortages. That committee's preliminary report had noted black market expansion and the disruption of trade channels and had recommended techniques for policing the behavior of new slaughterers.¹⁴⁵ With the powerful backing of this committee, OPA had moved to establish an effective slaughter control program,¹⁴⁶ only to find that the new slaughterers had already become respectable pillars of the business community and thus difficult to control.

But Anderson's account of the OPA failure and his defense of the OPS program did not convince Congress. The Butler amendment was adopted, 47 to 33,¹⁴⁷ and Senator Long's motion to reconsider was rejected, 53 to 27.¹⁴⁸ The House debate on the Hope amendment, identical to the Butler provision, paralleled the Senate fight, but with urban Congressmen carrying the burden of defending the agency program. The House accepted the amendment, 249 to 167.¹⁴⁹

The slaughter registration program is saved. In addition to quotas, OPS's meat distribution program also provided a slaughter registration program

144. 97 Cong. Rec. 7461 (June 27, 1951).

145. HOUSE REP. NO. 504, 79th Cong., 1st Sess. 11, 13-14 (1945).

146. See RUSSELL & FANTIN, *Livestock Slaughter Controls* in STUDIES IN FOOD RATIONING (HISTORICAL REPORTS ON WAR ADMINISTRATION: OPA) 315-403 (Gen. Pub No. 13, 1947).

147. 97 Cong. Rec. 7465 (June 27, 1951).

148. 97 Cong. Rec. 7608 (June 29, 1951).

149. 97 Cong. Rec. 8096 (July 10, 1951); 97 Cong. Rec. 8803 (July 20, 1951).

designed to prevent entry of illegitimate slaughterers. DR 1 classified slaughterers, established criteria for the registration of new slaughterers, required separate registration for each species of animal, and prohibited slaughter of cattle, calves, sheep, lambs, or hogs without registration. As legislative consideration of the Butler amendment progressed, supporters of slaughter registration feared that the amendment's language might be construed as sufficiently broad to terminate registration provisions along with the quota system. Industry members seeking to ban quotas were generally against the registration program as well. Moreover, Senator Butler of Nebraska, in speaking of his amendment, attacked the registration program. He argued that the Act did not permit licensing, but that the agency nevertheless had set up what amounted to a licensing system under the allocation power.¹⁵⁰ Senator Anderson seemed to agree that the Butler amendment would also scuttle the registration program; but the Majority Leader, Senator McFarland, disagreed, as did Senators Ferguson and Wherry.¹⁵¹ On the House side, nearly all speakers assumed that the Hope amendment wiped out all distribution restrictions. Congressman Hope himself argued,

"Let us have them all in without restrictions, just as we had before the controls went into effect. Then everybody will have an equal opportunity. . . ."¹⁵²

Because both houses passed identical provisions, the Butler-Hope amendment was not discussed in the Conference Committee's report on Defense Production Act revisions. In debating the Conference bill, however, Senate¹⁵³ and House Committee¹⁵⁴ leaders indicated that the registration program was not affected. OPS now felt more confident that the impact of the Butler-Hope amendment could be limited to quotas. Thus when the Agency revoked quotas, following Butler-Hope's passage, it reminded slaughterers that the registration program was still in effect.¹⁵⁵ Subsequently, DR 1 was revised to build the entire distribution program around registration.

But ambiguity in the history of the Butler-Hope amendment soon led to litigation over OPS authority to continue registration. In *United States v. K. & F. Packing and Food Corporation*,¹⁵⁶ this question was decided in favor of the agency upon a Government motion to restrain defendant from continuing its slaughtering operations without a registration number. District Judge Knight declared that the Butler-Hope amendment did not extend to the

150. 97 Cong. Rec. 7461 (June 27, 1951).

151. *Id.* at 7605.

152. 97 Cong. Rec. 8079 (July 10, 1951).

153. 97 Cong. Rec. 9234 (July 27, 1951).

154. 97 Cong. Rec. 9360 (July 30, 1951).

155. 16 FED. REG. 7675 (1951).

156. 102 F. Supp. 26 (W.D.N.Y. 1951).

registration program: "The language is clear. The intent is unmistakable. The amendment relates only to the abolition of quotas."

Request for repeal of Butler-Hope. In his special message of August 23, 1951, the President sought repeal of the slaughter quota prohibition.¹⁵⁷ The President repeated the argument that the Butler-Hope amendment "puts the black marketeer back in the meat business." In addition, he emphasized the real issue in the quota fight when he asserted that the amendment "is likely to make it impossible to have any successful control of meat prices for consumers." The message followed by three weeks the introduction, by Senators Capehart and Maybank, of a bill to reestablish quotas in modified form and to spell out legislative standards for slaughter registration.

The Senate Banking and Currency Committee held hearings on the Capehart-Maybank bill in late August and mid-September, and on September 28, 1951, reported out a substitute bill, which sought to meet the formal objections raised against the quota system.¹⁵⁸ In answer to the charge that quotas limit current marketings, the bill provided that quotas must equal at least 100 percent of livestock currently offered for sale. To meet the accusation that OPS was slow to increase quotas in areas with abnormally high marketings, the bill made prompt adjustment mandatory in such areas. And the bill accounted for the argument that the quota system discriminated against small slaughterers—an objection pushed largely by non-slaughtering processors and their wholesale purchasers—by providing that when and if any allocation system is placed in operation it must adequately meet the needs of new and legitimate sellers.

But along with these recommendations, the Committee also asked the Senate to expand the anti-rollback provision of the Fugate amendment. The Committee members had learned that OPS could effect a rollback on the better grades of beef without violating the Fugate standard for price ceilings. Such a possibility, it was reported, was "contrary to the real intent of the Congress as your committee understands it. . . ."¹⁵⁹ Although the agency disclaimed any intention of effecting such a rollback, the Committee proposed to make sure that this disclaimer stuck.

Senator Schoeppel of Kansas filed "Individual Views," which agreed to the clarification of the Fugate amendment but which stood staunchly by Butler-Hope.¹⁶⁰ He did lend further support to continuation of the slaughter registration provisions by arguing that "[e]ven without quotas, OPS has extensive powers to control and regulate the meat industry including registration of slaughterers, control of prices and so on."¹⁶¹ The Senator argued,

157. SEN. DOC. No. 61, 82d Cong., 1st Sess. 5 (1951).

158. SEN. REP. No. 840, 82d Cong., 1st Sess. (1951).

159. *Id.* at 3.

160. *Id.* at 6-16.

161. *Id.* at 14.

however, that quotas restrict production; for support he cited Department of Agriculture statistics predicting a drop in meat production. And in addition to restating Senator Butler's contention that quotas injure livestock producers, Senator Schoeppel argued that quotas did not benefit small packers or consumers:

"Another very pertinent argument against slaughter quotas is their use to beat down prices to small farmers without any net price decrease to consumers.

"Quotas tend to hurt independent small packers and encourage monopoly. The proof of the pudding on this point is that those of the Big Five packers who made themselves heard to the committee want quotas, while a majority of independents do not. . . .

"The OPS claims that quotas are a necessary adjunct of price-control on meat. This raises the issue of meat prices at all levels from producer to consumer. The price of meat is undeniably high, but compared with the huge increases in other products, wages, and services it is not out of line. Over the last 30 years, housewives have paid 5.6 percent of their income for meat on the average. In 1950, when consumers spent 5.6 percent, the same as in 1939, they obtain 20 pounds more meat per person than in 1939. In other words, they got a better buy in 1950."¹⁶²

In the midst of Senate reconsideration of the slaughter quota authority, OPS received an unexpected public relations bonanza from a segment of the industry. In a one-paragraph bulletin dated October 2, 1951, the general counsel of the National Independent Meat Packers Association told the group's membership:

"PRICE CONTROL. There is a chance of beating price control by defeating the Administration's attempt to restore the quota power to OPS. Mr. DiSalle has said that price control on meat will not work without the quota power. This makes it terribly important to do everything we reasonably can to defeat quotas, if we want to put an end to price control. I fully realize that opinion in NIMPA is divided on the subject of quotas, but I believe that the opinion will be unanimously against quotas if we could put an end to price control through defeating the restoration of the quota power. It is important for those who agree with this proposition to write their Senators and Representatives in opposition to restoring the quota power."

DiSalle publicized this paragraph as proof "that the fight against slaughter controls is actually a fight against the price control program itself."¹⁶³

But this revealing bit of evidence was not sufficient to carry the day. In the rush for adjournment, the Capehart-Maybank bill did not come to a vote. The Senate twice passed over the bill, largely because of a belief that the House would not concur: the House Rules Committee had failed to give

162. *Id.* at 14-15.

163. OPS Press Release, GPR No. 911, October 5, 1951.

priority to the House version of the bill to modify the Capehart amendment; moreover, the House had made no move to modify the Butler-Hope amendment. And so the move to restore the quota authority had been killed.

Allocation Records and Grademarking

Shortly after issuance of the short-lived quota regulation in DR 1, OPS had issued a second regulation governing the distribution of meat. While the principal objective of DR 1 was to channel livestock to legitimate slaughterers, DR 2 aimed at equitable distribution of meat to subsequent processors and to ultimate consumers, both military and civilian. Because of the favorable supply situation, DR 2 did not immediately impose allocations, but set forth the regulatory framework and required slaughterers to keep records for possible use in a later allocation program. DR 2 ordered that records of current deliveries specify class of purchaser, weight range, and grade of each cut of meat sold. In order to standardize references to quality, slaughterers were required to employ U. S. Department of Agriculture grades in making current sales of beef, veal, calf, lamb, and yearling mutton.

After several months of intra-agency debate over its necessity, OPS announced the first allocation system (DR 3),¹⁶⁴ governing sales of beef to the Military Establishment. Under this regulation, packers killing in excess of a specified percentage of their 1950 kill must fill military orders to the extent of this excess. Since the military expected to place orders for only the best grades of beef, the grademarking requirement of DR 2 became immensely useful.

Grademarking, however, was important not only for allocation records and DR 3, but also for administration of meat price controls. Under the processor-wholesaler (CPR 24) and retail (CPR 25) beef regulations, ceilings were established by reference to the grades required by DR 2. After the Director had denied early challenges to this procedure,¹⁶⁵ the issue was litigated by a defendant to a criminal information in a district court in Kansas. In this case, *United States v. Excel Packing Co.*,¹⁶⁶ District Judge Hill granted defendant's motion to dismiss on the ground that the Butler-Hope amendment invalidated DR 2, including the grademarking requirement. The court's order also stated that Section 101 of the Act could

"... be construed as authorizing the imposition of compulsory grading and grade marking only in conjunction with the actual allocation of meat and did not authorize the imposition of such requirements merely in anticipation of a future need of such an allocation program. As of the date set forth in the Information, there was not in effect any allocation program [referring to DR 3]. . . ."

164. 16 FED. REG. 12186 (1951); see also Supp. 1 thereto, *id.* at 12190 (1951).

165. G. H. Waldock, Inc., OPS Nos. 1024-13-P through 1024-20-P, Nov. 15, 1951.

166. Crim. No. 8605, D. Kan., April 17, 1952 (no opinion).

The contrary result was reached in a similar case, *United States v. Garri-gan*,¹⁶⁷ a criminal action brought in a district court in Wisconsin.

The Talle addition to Butler-Hope. More by accident than by design, Congress, in the 1952 amendments, reaffirmed the legislative basis for the grade and grademarking requirements. Congressman Talle of Iowa, a member of the House Committee, introduced an amendment to Section 101 to end mandatory registration of slaughterers on a species basis under DR 1. In addition, his amendment permitted shifting from non-kosher to kosher production without restriction and made any allocation orders under DR 2 and DR 3 await a finding by the Secretary of Agriculture that all meat was in short supply.

The industry did not evidence much interest in the Talle proposals, although counsel for an association of 500 independent processors and wholesalers appeared before Senate and House Committees to ask that OPS fully consider small independents in any allocation program.¹⁶⁸ OPS witnesses argued that elimination of separate registration by species would encourage black marketing by small new operators, for it would impede easy examination of slaughterers' behavior.¹⁶⁹ OPS considered the suggested "short supply" criterion for allocations more dangerous; it would cancel the military allocation program of DR 3 and prevent other future allocations so long as there existed substantial supplies of either livestock or hogs.

The House Committee rejected agency assertions and accepted the Talle amendment, but at the same time it did attempt to sanctify the grademarking program; it added a proviso which would blot out the *Excel* decision by ratifying the grading and grademarking regulation. As the Committee explained it:

"[This] proviso . . . makes it clear that the present grading and grade-marking program . . . is not affected by the limitation on the OPS' authority to allocate. Apart from this consideration, the present grading and grade-marking requirements of OPS are essential to permit compliance . . . with last year's amendment . . . that no ceiling shall be established . . . below 90 percent of the price received (by grade) by producers on May 19, 1951, as determined by the Secretary of Agriculture."¹⁷⁰

The Senate bill contained no similar provision, but the Conference Committee and the Congress accepted the Talle amendment with the added proviso.¹⁷¹

167. Crim. Nos. 47, 62-6, 70-1, E.D. Wis., Nov. 3, 1952 (no opinion).

168. *Hearings, supra* note 6, at 1203-6; and *Hearings before House Committee, supra* note 79, at 592-5.

169. The strongest congressional statement against the Talle amendment came from Majority Leader McCormack during the House debate on the Conference Report, which of course was too late to have any effect upon the provision. 98 Cong. Rec. 8592 (June 28, 1952).

170. HOUSE REP. NO. 2177, 82d Cong., 2d Sess. 20 (1952).

171. HOUSE REP. NO. 2352, 82d Cong., 2d Sess. 1, 28 (1952); see Congressman Talle's statement, 98 Cong. Rec. 8593 (June 28, 1952).

OPS then amended DR 1 to eliminate separate registration by species.¹⁷² The kosher provision demanded no regulatory change, since there existed no specific restrictions on different types of slaughtering operations. To meet the amendment's "short supply" mandate, DR 1 was revised to require sales of meat to institutional users only after "short supply" certification by the Secretary of Agriculture, and DR 3 was also changed to limit the operation of the military allocation.¹⁷³

The Hotel-Supply House Amendments

Controversy over OPS ceilings on meat prices charged by "hotel-supply houses" to restaurants and other public meal-purveyors supplies an interesting example of interaction among legislation, regulation, and judicial review. Some of these houses are "affiliated" houses, most of which are wholly or partially owned by the largest meat packers. Others are independent. OPS meat regulations gave independents and affiliates disparate treatment. Affiliates were classified as "combination distributors," which caused them to receive a slightly lower ceiling price than that set for the independents.

The court finds discrimination. This ceiling differential was challenged in a series of protests filed by supply houses which were wholly-owned subsidiaries of Wilson & Co.,¹⁷⁴ one of the "Big Four" packers. The supply houses claimed that prior to controls, the price levels of affiliates and independents were generally the same and that the differential was thus discriminatory. In denying the protests, OPS replied that although it had no adequate pre-control *price* information, there had formerly existed a difference in *markups* between independents and affiliates. Moreover, OPS maintained that the differential attempted to implement the Act's insistence that the Director foster competitive enterprise, "including independent small-business enterprises" . . . In formulating the regulatory provision under attack," Director DiSalle had

"assumed that there was a strong possibility of a short supply of beef in relation to the demand. In this setting there is every reason to believe that the establishment affiliated with the packer will receive an adequate supply and the independent will not be able to obtain its normal supply. In such case, the independent's costs of operation will increase (particularly the expenses incident to the acquisition of beef) and a higher markup will be required to permit this type of establishment to carry on anywhere near its normal operations."¹⁷⁵

172. 17 FED. REG. 6698 (1952).

173. 17 FED. REG. 7428 (1952).

174. Davidson Meat Co., OPS No. 1024-1-P, Consolidated, May 7, 1951; Gotham Hotel Supply Co., OPS No. 1074-1-P, Consolidated, Oct. 18, 1951.

175. Davidson Meat Co. v. Arnall, No. 592, Em. Ct. App., Transcript of Administrative Proceedings 129-30, Dec. 19, 1951.

But the Emergency Court of Appeals found the discrimination objection persuasive, and in *Davidson Meat Co. v. Arnall*¹⁷⁶ it declared the relevant portions of the meat regulations invalid. Concerning the agency's claim of historical markup differences, Judge Magruder wrote:

"The data we have summarized is wholly insufficient to justify an inference that affiliated hotel supply houses have not historically enjoyed as high markups as have independent hotel supply houses. Furthermore, markup data would seem to be irrelevant to the present inquiry, since we must take it, on this record, that there has been no historical differential in the general level of prices charged by the affiliates and the independents competing at the same level of distribution. . . ."

And the court was not convinced that the differential was necessary to prevent hindrance of the independents' competitive position during short supply periods:

"We fail to see how the differential would serve to counteract this tendency. Respondent disavows any intention to put the affiliated hotel supply houses out of business; and in the absence of any contention by complainants to the contrary, we must assume that the present ceilings are sufficient to enable the affiliates to operate profitably. Therefore the parent slaughterers still have a pecuniary incentive for augmenting the hotel supply business of their own affiliates. The regulation imposes no quota upon the amount of beef which the slaughterers may channel to their affiliates, nor does it impose any quota upon the amount of fabricated cuts which the affiliates may sell to purveyors of meals. . . ."

In the judgment of those responsible for the meat program, the decision placed the agency in a box. Adoption of the court's suggestion of a quota system for meat might provoke a charge that the Butler-Hope amendment was being violated. The court itself might have been willing to agree, in subsequent litigation, that the type of quota involved could be supported under the pricing provisions of the Act. However, to impose any kind of a quota system on meat during June, 1952, while Congress was considering extension of the Act, would invite an explosive reaction on Capitol Hill.

OPS replies and Congress reacts. Accordingly, the agency abandoned any notions of relying on quotas, and it amended the meat regulations to treat both affiliated and independent establishments as hotel-supply houses.¹⁷⁷ For all fabricated cuts, ceilings were to be identical. But for primal and boneless cuts, ceilings were to depend on their sources of supply. If the meat were secured from independent sources, both independent and affiliated houses

176. No. 592, Em. Ct. App., May 14, 1952.

177. Amendment 12 to CPR 24, 17 FED. REG. 5457 (1952); Amendment 6 to CPR 74, 17 FED. REG. 5459 (1952); Amendment 6 to CPR 92, 17 FED. REG. 5460 (1952); and Amendment 4 to CPR 101, 17 FED. REG. 5456 (1952).

would have the same ceilings; but an affiliate who secured such meat from a parent slaughterer would be entitled to a smaller markup than the independent.

The industry did not contend that this ruling flouted the court's holding, but it did suggest that the opinion was susceptible of more generous interpretation. During the 1952 House debates on price control amendments, Congressman Multer of the House Banking and Currency Committee was induced to offer an amendment placing a broader construction on the *Davidson* opinion. This amendment required that the same ceiling prices be accorded to both affiliates and independents, and its legislative history was to the effect that a lower ceiling based upon source of supply would be improper. The House accepted the amendment by a voice vote,¹⁷⁸ the Conference Committee concurred,¹⁷⁹ and Section 402(m) was added to the Act. Accordingly, the meat regulations were promptly amended to eliminate the source-of-supply distinction.¹⁸⁰

In Conference there was added to Section 402(m) a clause stating that equal price treatment should also be extended to affiliated wholesalers "whose affiliation does not amount to an interest or equity of more than 50 per centum."¹⁸¹ Although stated generally, the effect of this addition was to grant relief to a single company which had protested the OPS provision barring an affiliated wholesaler from taking a markup if it was ten percent controlled.¹⁸² This company might have eventually prevailed on an extension of the theory of the *Davidson* case. Yet this legislative resolution of the question of appropriate markups for meat distributors should lend little encouragement to the slaughterers who contend that, under the *Davidson* doctrine, their packer branch houses should have the same ceilings as wholesalers. This contention is raised in a case soon to be decided by the Emergency Court of Appeals.¹⁸³

The Williams Amendment: The Farmer's Share of the Food Dollar

Section 402(n) of the Act, the Williams amendment, added in 1952, provides that "[n]otwithstanding any other provision of this Act," whenever ceilings are set at the farm level, margin controls must simultaneously be imposed on processors, wholesalers, and retailers. These margin controls are to allow "the normal markups as provided under the Act, except that under no circumstances are the sellers to be allowed greater than their normal margins of profit." This amendment principally affected the meat pro-

178. 98 Cong. Rec. 7863 (June 20, 1952).

179. HOUSE REP. NO. 2352, 82d Cong., 2d Sess. 20 (1952).

180. Amendment 13 to CPR 24, 17 FED. REG. 6148 (1952); Amendment 8 to CPR 74, 17 FED. REG. 6149 (1952); Amendment 7 to CPR 92, 17 FED. REG. 6150 (1952); and Amendment 5 to CPR 101, 17 FED. REG. 6150 (1952).

181. HOUSE REP. NO. 2352, 82d Cong., 2d Sess. 20 (1952).

182. E. W. Kneip, Inc., OPS No. 1024-22-P, July 15, 1952.

183. Swift & Co. v. Woods, No. 616, Em. Ct. App., 1952.

gram because only beef and soybeans were under control at the farm level at the time of enactment.¹⁸⁴

The Williams amendment was not a response to particular OPS regulations, but rather arose out of congressional suspicion that the operation of price control tended to bolster processors and distributors at the expense of farm producers. It was believed that farmers were not fully sharing in increases in consumers' prices, despite public outcry blaming farmers for food price levels. Here was the perennial question of whether legislation can assure the farmer his "normal" share of the food dollar.

The Senator persuades Congress. The history of the Williams amendment dates back to 1950, when Senator Williams unsuccessfully offered an amendment which would prohibit the establishment of ceilings which "allow any seller a margin of profit greater than his normal margin of profit. . . ."¹⁸⁵ His purpose was to prevent sellers from receiving an unusually high ceiling as a result of a general freeze regulation. His second attempt, a narrower proposal, succeeded. He sought an amendment, which eventually became Section 410 of the Act, under which Government procurement agencies would be required to use contracts forcing processors of chickens and turkeys to pay ceiling prices to growers (if such ceilings existed), or else return part of the contract price to the Government.¹⁸⁶

In 1951 Senator Williams pressed his plan further. He asked the Senate Committee to require OPS amendment of the general freeze regulation (GCPR) to force reduction of processors' food ceilings when the cost of agricultural commodities declined. For administrative reasons, the GCPR permitted processors and distributors to "pass through" such cost *increases* (raise prices by exact amount of cost increment) in order to comply with the parity requirement of Section 402(d)(3) of the Act; but there was no downward "pass through" where farm product prices dropped. Before this proposal was rejected by the Conference Committee, Senator Williams wrote Price Director DiSalle that the GCPR was unfair to both farmers and consumers; Mr. DiSalle replied that he wished to prevent windfall profits but did not believe a regulation providing for upward and downward ceiling fluctuations would be workable or enforceable.

Renewing his arguments during the 1952 Senate debate, Senator Williams introduced the amendment which was to become Section 402(n) of the Act.¹⁸⁷ Chairman Maybank and Senator Robertson opposed the amendment, revealing that the Conference Committee had rejected the 1951 Williams proposal on the ground that it would conflict with the Capehart and Herlong

184. Supplementary Regulation 3 to the GCPR, 16 FED. REG. 815 (1951), since superseded by CPR 173, 17 FED. REG. 8767 (1952).

185. 96 Cong. Rec. 2702-4 (August 15, 1950).

186. *Id.* at 2705.

187. 98 Cong. Rec. 7181 (June 11, 1952).

amendments.¹⁸⁸ But the Senate, anxious to please the farmer, adopted the 1952 Williams amendment, and it was accepted by the Conference Committee and became law.¹⁸⁹

Problems after Williams. The Williams amendment has presented OPS with a host of legal problems. The Senate accepted it with notice that it probably conflicted in one way or another with both the Capehart and Herlong amendments, and used language indicating that in case of conflict, Williams is to prevail. But the most troublesome legal task is ascertaining the content of the "normal margin" standard to be applied to processor and distributor ceilings whenever ceilings exist at the farm level. The nearest legislative expression is the "generally fair and equitable margin for processing" standard of Section 402(d)(3) of the Act. In a 1945 Emergency Court case, it was held that this standard was synonymous with the 1942 Act's "generally fair and equitable" requirement,¹⁹⁰ which also appears in the Defense Production Act. Even assuming that the new Williams standard is synonymous with this requirement, there remains the tricky administrative problem of adjusting processor and distributor ceilings to reflect fluctuations in farm prices governed by ceilings.

The Influence of the Meat Amendments

The major defect in the OPS meat program is the agency's inability to impose slaughter quotas. No other legislative attack, however important, has achieved the significance of the Butler-Hope amendment. To police meat distribution, OPS has been forced to rely on other regulatory techniques. The slaughter registration program is employed to block entry of illegitimate processors. For a time the agency used pricing differentials to direct meat distribution into established channels, but the implications of the *Davidson* decision and the 1952 amendment which followed it have forced OPS to revise its policy.

Although these substitute methods do not compensate for the absence of quotas, voluminous livestock marketings fortunately have prevented black market growth. The steer population is so bountiful today that slaughterers are paying sub-ceiling prices for live animals, although consumer demand is strong enough to lift retail prices up to ceiling for many cuts of beef. Yet without quotas, a tightening of supply at the farm level would almost assure the immediate development of a black market in beef.

CONCLUSIONS AND RECOMMENDATIONS

The 1951 and 1952 price control amendments have substantially altered and weakened the program of regulation. In the manufacturing area, roll-

188. *Id.* at 7181-2.

189. HOUSE REP. No. 2352, 82d Cong., 2d Sess. 20 (1952).

190. *Armour & Co. v. Bowles*, 148 F.2d 529 (Em. Ct. App. 1945), *cert. denied*, 325 U.S. 871 (1945).

backs are prohibited, and the effect of the mandatory individual pricing program is to permit a *roll-forward* of producers' prices. In the distributive trades, sellers have been guaranteed an increased dollar margin with every rise in the manufacturers' prices to them. Finally, in the meat industry, not only are rollbacks barred, but OPS has also been prohibited from using the quota power to head off the development of black markets. Supplementing these major restraints on the price program are the grants of legislative "relief" to specific groups of sellers.

The amendments have had a further effect, which stems from the nature of the legislative process and the pattern of Congress-agency interaction. In the case of most of the amendments discussed in these pages, a regulation or a plan for a regulation has evoked legislation modifying or blocking the specific OPS policy; the amendment has brought into being new lines of defense against inflation, and this new agency approach in turn has come under careful congressional scrutiny. Thus, few of the amendments purport to deal with the basic authority contained in the Defense Production Act of 1950. But the fact that in form these amendments only apply to particular areas of the economy should not obscure the fact that in operation they tend to modify the basic legislative structure. In this process of substituting its views for those of the agency, Congress finds it necessary to set forth standards in the greatest of detail. This particularity deprives the agency of its discretion in several areas and, in addition, places upon it a mandate to carry out these latest expressions of congressional intention. For these reasons top agency officials spend much of their time administering and defending their construction of the detailed amendments, and almost no time working toward the basic purposes of the Act; nor does Congress have the opportunity fully to consider the Act's basic economic policy or to make improvements in the Act's fundamental plan. Soon the detailed amendments, in actual administration, have superseded the rest of the statute. Annual renewal of the Act, presenting frequent opportunity for detailed amendment and thus for fresh distraction of administrators and legislators alike, makes this supersession appear inevitable.

Although this article has focussed on the impact of amendments on the program of controls, analysis of congressional response to other aspects of price stabilization activity—exemptions from controls, enforcement, and administrative procedure and judicial review—would yield a similar narrative and similar conclusions. The Act originally exempted certain activities from the imposition of any controls. In addition, the special agricultural standards of the statute made controls inapplicable in much of the food area. The general freeze regulation created certain additional exemptions, largely for practical administrative reasons. In 1951 Congress developed further statutory exemptions, while rejecting pleas for others. Then came the period of "soft markets," when many items began selling substantially under ceiling. Demands for de-control led OPS to formulate administrative standards for both exemptions

and suspensions;¹⁹¹ these standards underwent considerable debate during the 1952 legislative session. The House rejected the OPS approach, the Senate approved of it, and the Senate finally prevailed, but only after making the major concession of exempting all fruits and vegetables in fresh or processed form.¹⁹² In the sanctions area, the 1951 session extended new help to the agency. The enforcement program, which is under the joint responsibility of the Department of Justice, the United States Attorneys, and OPS, has not been vigorous by comparison to OPA; thus there has been little demand for shaving the agency's statutory enforcement authority. And with respect to administrative procedure and judicial review,¹⁹³ Congress has twice rejected an attempt to impose the Administrative Procedure Act on OPS; but in 1952 Congress did change the standard for judicial review of regulations to conform to provisions of the Administrative Procedure Act.¹⁹⁴

The unfortunate effects of the amending process on OPS's control program, as well as on other aspects of its activity, indicate the need for two basic statutory changes.

If the Eisenhower Administration is to deal effectively with the problem of inflation by use of direct price controls, urgent consideration should be given to a two-year statute, even if some sacrifice must be made in the substance of the Act. It was during the period from January, 1942, to June, 1944, when it was not interrupted by congressional enactments, that OPA was able to establish a relatively effective program. Surely by this time Congress is aware that annual renewal is not necessary for the purpose of preventing "controls for control's sake"; if price controls, traditionally suspect in our society, prove unnecessary prior to the expiration of a new Act, they may be terminated by its repeal, by the reduction of appropriations, or by some other means.

Secondly, the OPS experience indicates that to secure a statute permitting effective price controls, we must start anew. To expect to improve upon the present Act, with its Capehart, Herlong, Butler-Hope, and numerous other special amendments, is to hope for too much. The renewal of debate over these provisions will give rise to the same old arguments, both pro and con,

191. OPS Press Release, GPR No. 1585, August 29, 1952.

192. The congressional policy with respect to the suspension of controls, as contained in Section 412 of the Act, reaffirms the administrative approach. The exemption for fruits and vegetables appears in the last sentence of Section 402(d)(3) of the Act, and is more familiarly referred to as the Harrison amendment.

193. Although an analysis is not extant of the significant administrative procedure contained in the Emergency Price Control Act and the Defense Production Act, discussions of the equally significant judicial review provisions appear in NATHANSON & LEVENTHAL, *PROBLEMS IN PRICE CONTROL: LEGAL PHASES* (HISTORICAL REPORTS ON WAR ADMINISTRATION: OPA) 1-4, 76-89 (Gen. Pub. No. 11, 1947); and in Hyman & Nathanson, *Judicial Review of Price Control: The Battle of the Meat Regulations*, 42 ILL. L. REV. 584, 587-93 (1947).

194. 60 STAT. 237 (1946).

and involve Congress in the troublesome process of ending or redistributing special benefits.

If Congress and the country are to concern themselves with the basic purposes of this type of legislation; if the inhibitions of the past two years are to be laid aside; and if the public is expected to give such a program its support, it is only by the drama of probing for new legislative solutions that the Administration can be successful. At the beginning of every new Administration, there is a "honeymoon" period when party responsibility takes on a fresh look. That period is now before us; to try to live with the present legislative structure, while a new legislative program is slowly formulated for presentation in 1954, could be a tragic mistake.

THE YALE LAW JOURNAL

VOLUME 62

DECEMBER, 1952

NUMBER 1

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